

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DALBERT TYRONE BANKS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1287 WDA 2013

Appeal from the Judgment of Sentence of July 10, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0005748-2011

BEFORE: FORD ELLIOTT, P.J.E., BOWES, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED APRIL 22, 2014

Dalbert Tyrone Banks (“Banks”) appeals the July 10, 2013 judgment of sentence, which was imposed after his probation was revoked. We affirm.

The factual and procedural history of this case fairly can be summarized as follows. On June 30, 2011, Banks was charged by criminal information with indecent exposure,¹ and two summary counts of harassment.² These offenses occurred on March 31, 2011. On September 13, 2011, Banks entered a negotiated guilty plea to indecent exposure. On that same date, the Commonwealth withdrew the two summary offenses and Banks was sentenced to six to twelve months’ incarceration, three

¹ 18 Pa.C.S. § 2709(a).

² 18 Pa.C.S. § 3127.

years' probation, and was directed to abide by special probation conditions. Notes of Testimony I ("N.T. I"), 9/13/2011, at 9-10. Banks also received credit for 166 days of time served. **Id.** On July 10, 2013, Banks reappeared before the trial court for a probation violation hearing. Banks was found to have violated his probation by failing to report to his probation officer after his release, and by failing to provide a valid address to his probation officer. Additionally, Banks had been convicted on one count of indecent assault without the consent of another in a separate case.³ Notes of Testimony II ("N.T. II"), 7/10/2013, at 2-3. As a result of the violation, Banks was re-sentenced to fifteen to thirty-six months' incarceration.

On July 11, 2013, Banks filed a motion to reconsider sentence. On July 15, 2013, the trial court denied the motion. On August 9, 2013, Banks filed a timely notice of appeal. Also on August 9, 2013, the trial court ordered Banks to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On August 29, 2013, Banks filed a Rule 1925(b) statement. The trial court issued its Rule 1925(a) opinion on September 13, 2013.

Banks presents the following issue for our review:

WAS THE SENTENCE IMPOSED MANIFESTLY EXCESSIVE, UNREASONABLE, AND AN ABUSE OF DISCRETION WHERE A SENTENCE OF TOTAL INCARCERATION WAS IMPOSED FOLLOWING VIOLATIONS OF PROBATION AND WHERE SUCH A

³ 18 Pa.C.S. § 3126.

SENTENCE FAILED TO CONSIDER THE REHABILITATIVE NEEDS
OF THE DEFENDANT OR HIS NATURE AND CHARACTERISTICS?

Banks' Brief at 4.

Banks' claim that the sentencing court abused its discretion in sentencing him to a term of total confinement following his probation revocation is a challenge to the discretionary aspects of his sentence. **See Commonwealth v. McAfee**, 849 A.2d 270, 274 (Pa. Super. 2004). "[T]here is no absolute right to appellate review of the discretionary aspects of a sentence." **Commonwealth v. Mouzon**, 812 A.2d 617, 621 (Pa. 2002). Rather, an appellant seeking to challenge the discretionary aspects of sentence must invoke this Court's jurisdiction by doing the following:

Two requirements must be met before we will review this challenge 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 [pursuant to Pa.R.A.P. 2119(f)]. 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) (quoting **McAfee**, 849 A.2d at 274); Pa.R.A.P. 2119(f). Instantly, Banks has included a technically compliant Rule 2119(f) statement. In his Rule 2119(f) statement, Banks presented reasons for allowance of appeal, arguing that the sentence of total confinement was excessive and an abuse of discretion,

in that the sentence imposed was unduly harsh and the sentencing court failed to consider Banks' rehabilitative needs, and his personal nature and characteristics. We have held that claims alleging that the imposition of sentence following probation was "grossly disproportionate," "failed to consider [the defendant's] background or nature of [the related] offenses," and failed to "provide adequate reasons on the record for the sentence" may qualify as a substantial question. **See Commonwealth v. Parlante**, 823 A.2d 927, 929 (Pa. Super. 2003) ("These are 'plausible' arguments that [a defendant's sentence] is 'contrary to the fundamental norms which underlie the sentencing process.'" (quoting **Mouzon**, 812 A.2d at 622 (Pa. 2002))).⁴ Therefore, we will address the merits of Banks' appeal.

"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. Smith**, 669 A.2d 1008, 1011 (Pa. Super. 1996). An abuse of discretion is more than an error in judgment — a sentencing court has not abused its discretion "unless the record discloses that the judgment exercised was

⁴ "We conduct a case-by-case analysis to determine which allegations constitute a substantial question." **Commonwealth v. Malovich**, 903 A.2d 1247, 1252 (Pa. Super. 2006) (citing **McAfee**, 849 A.2d at 274). "This Court does not include or exclude an entire class of questions as being or not being substantial. Instead, we evaluate each question to determine whether or not it is substantial in the particulars of its own case." **Id.** (citing **Mouzon**, 812 A.2d at 626-27; **McAfee**, 849 A.2d at 274) (citation omitted).

manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa. Super. 2000) (citation omitted).

In imposing a sentence of total confinement after revoking Banks’ probation, the trial court was bound to consider the factors set forth at 42 Pa.C.S. § 9771(c). Subsection 9771(c) states that the court may not impose a sentence of total confinement following revocation of probation unless one of the following prerequisites 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 the court.

42 Pa.C.S. § 9771(c).

Once [one of] these prerequisites have been established, the court should consider the Sentencing Code’s criteria for total confinement, the character of the defendant, and the circumstances of the crime for which sentence is being imposed. ***Commonwealth v. DeLuca***, 418 A.2d 669 (Pa. Super. 1980). The Sentencing Code provides that:

The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because:

- (1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;

(2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

42 Pa.C.S. § 9725.

Commonwealth v. Mathews, 486 A.2d 495, 497-98 (Pa. Super. 1984) (internal citations omitted). We conclude that the court did not abuse its discretion in sentencing Banks to total confinement.

The record indicates that, on April 8, 2012, while on probation, Banks was convicted of indecent assault. Because a subsequent conviction is adequate for the purposes of imposing total confinement pursuant to subsection 9771(c)(1), the court was authorized to impose the instant sentence. Having satisfied this initial inquiry, we now turn to the specific reasons that the sentencing court relied upon in ordering total confinement. **See Commonwealth v. Fowler**, 893 A.2d 758, 766 (Pa. Super. 2006) (“[T]he sentencing court must state its reason for the sentence on the record” (citing 42 Pa.C.S. § 9721(b))). In relevant part, the sentencing court stated the following immediately before sentencing Banks to total confinement:

As I read the presentence report, the incident that involved the [indecent assault conviction] is described as happening when [Banks] was walking with the victim and suddenly stopped and pushed up her shirt and bra in an attempt to have sexual contact with her. This was out of nowhere that this happened. Assuming it is reasonable that it happened that way, putting [Banks] in a three-quarter house where he isn't confined and he isn't under restriction would allow him to continue to engage in

that kind of conduct. [Banks] can walk out of the door and walk up to any female and grab her breasts. That's what he tried to do here. That's not very protective of the public. That's the trouble I'm having with this approach.

We were aware of [Banks'] history last time, and while on supervision he continues to do this. We need to tilt the balance more in the direction of public safety than toward the defendant.

* * *

The [c]ourt finds [Banks] has had opportunities in the past to conform his conduct, and he has not done so. There may be mitigating circumstances as to that, although I note the presentence report indicates he is married and has had relationships with two other women that produced children. It doesn't appear that [Banks] can't relate to women at all, and there is really no diagnosis that he is suffering from anything

Nonetheless, I feel supervision has failed to get [Banks'] attention, and he has committed worse conduct quite frankly while he has been on supervision. The Court doesn't believe that putting him in a setting where his freedom isn't restricted adequately addresses the public safety issues that are put at stake by his continued conduct.

N.T. II at 5-10.

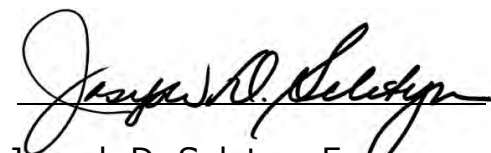
Based on the foregoing, the sentencing court clearly found that committing Banks to a state correctional institution would be more effective than a less-restrictive sentence. Additionally, the sentencing court also indicated that it believed Banks was at risk for recidivism. While Banks may disagree with the manner in which the sentencing court chose to weigh the factors, his discontent in no way establishes an abuse of discretion. **See Commonwealth v. Marts**, 889 A.2d 608, 615 (Pa. Super. 2005) (stating that although defendant "disagrees with the sentencing court's conclusion

regarding his rehabilitative potential[, that disagreement] does not render the sentence imposed an abuse of discretion”). Furthermore, the record indicates that the sentencing court had the benefit of a pre-sentence investigation (“PSI”) at the revocation hearing. N.T. at 5. “[W]here the sentencing judge had the benefit of a presentence investigation report, it will be presumed that he or she was aware of the relevant information regarding the defendant’s character and weighed those considerations along with mitigating factors.” **Commonwealth v. Boyer**, 856 A.2d 149, 154 (Pa. Super. 2004).

Accordingly, we conclude that the sentencing court’s imposition of sentence was authorized pursuant to subsection 9771(c)(1), and that the court adequately considered Banks’ personal characteristics and sufficiently stated its reasoning on the record. Thus, the sentencing court did not abuse its discretion.

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: 4/22/2014