NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RICHARD H. FLORY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1304 MDA 2013

Appeal from the Judgment of Sentence June 20, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0002498-2000
CP-36-CR-0003465-2000
CP-36-CR-0003562-2000

BEFORE: DONOHUE, J., ALLEN, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: **FILED JUNE 19, 2014**

Appellant, Richard H. Flory, appeals from the June 20, 2013 aggregate judgment of sentence of three and one-half to seven years' imprisonment, with credit for time-served, imposed following the revocation of his parole and probation. After careful review, we affirm the judgment of sentence.

The trial court summarized the relevant facts and procedural history of this case as follows.

> [Appellant] is a 40[-]year old individual with an extensive criminal history including convictions on twelve dockets, eleven of which were for Burglary, Theft, or Receiving Stolen Property, and at least four parole and probation violations. At the time of his most recent violation, [Appellant] was under supervision on three separate dockets: on [CP-36-CR-000]2498-2000 for Burglary[1] (F-2) and Criminal Conspiracy to Commit Burglary[2] (F-2); on [CP-36-

CR-000]3465-2000 for Receiving Stolen Property[3] (F-3); and on [CP-36-CR-000]3562-2000 for Burglary[4] (F-2) and Theft by Unlawful Taking[5] (M-2).

[Appellant] was initially sentenced on [May 22, 2003, at] each of these dockets to an aggregate of one year less one day to two years less one day of incarceration followed by eight years of consecutive probation.[6] [Appellant] was paroled from this sentence on January 29, 2004, and successfully completed his parole on March 25, 2005. [Appellant] then began serving the probation portion of his split sentence.

On April 9, 2009, a *capias* was issued alleging that [Appellant] violated the terms of his probation by failing to report to scheduled appointments with his probation officer. [Appellant] was incarcerated on May 22, 2010, and on May 25, 2010, the *capias* was amended to include that [Appellant] received a new charge of Driving Under the Influence. On June 25, 2010, it was determined that [Appellant] violated his probation. [That same day, Appellant]'s probation was revoked and he was resentenced to time[-]served to twenty-three months followed by two years of consecutive probation. [Appellant was released on July 1, 2010].

On November 24, 2010, a second *capias* was issued, this time alleging that [Appellant] tested positive for and admitted to using cocaine. The same day, [Appellant] was detained and remanded to Lancaster County Prison. On December 27, 2010, th[e trial c]ourt determined that [Appellant] violated his parole. The [trial c]ourt revoked [Appellant]'s parole and resentenced him to serve the unexpired balance of his sentences, making him eligible for parole after six months. [Appellant] was released from Lancaster County Prison on May 24, 2011.

On February 8, 2012, [Appellant] was found unconscious in the town square in Manheim, Pennsylvania. [Appellant] was transported to the hospital where it was determined that he lost

consciousness as a result of consuming too much alcohol. [Appellant] had previously been ordered to abstain from alcohol use as a condition of his supervision. Moreover, [Appellant] was charged with Public Drunkenness and Possession of Drug Paraphernalia in connection to this incident. Accordingly, on February 17, 2012, a *capias* was issued and [Appellant] was incarcerated. [Appellant] filed a petition for walk-in status, which Petition was granted, and he was released from Lancaster County Prison on March 15, 2012.

On May 1, 2012, [Appellant] called to reschedule an appointment with his probation officer, claiming that he had to work. [Appellant] was instructed to report to the probation office on May 4, 2012, but failed to appear, this time stating that he was in the hospital. A new appointment was scheduled for May 7, 2012 and [Appellant] was specifically directed to bring verification of his hospital stay. Once again, [Appellant] failed to report for his appointment. Accordingly, his walk-in status was revoked and a *capias* and a bench warrant were issued. While the bench warrant was still active, [Appellant] was charged with Receiving Stolen Property and Theft by Unlawful Taking, and the *capias* was amended to include the new offenses.

On April 10, 2013, th[e trial c]ourt found that [Appellant] violated his parole and probation on Counts 1 and 3 of [CP-36-CR-000]2498-2000, Count 1 of [CP-36-CR-000]3465-2000 and Counts 1 and 5 of [CP-36-CR-000]3562-2000, and his parole and probation were revoked. A Pre-Sentence Investigation (PSI) [report] was ordered, and on June 20, 2013, [Appellant] was re-sentenced on all counts to three and one half to seven years of incarceration with all counts and all dockets to run concurrently to one another. The [trial c]ourt additionally ordered that [Appellant] was to be given "credit for all time served to date on these dockets."

[On June 28, 2013, Appellant] filed a timely Post Sentence Motion to Modify Sentence[,] claiming,

> in part, that despite the [trial c]ourt's directive, [Appellant] only received credit for time[-]served on the most recent *capias*. Accordingly, on July 10, 2013, th[e trial c]ourt issued an Order specifying that [Appellant] "shall receive additional credit towards the sentences imposed on June 20, 2013 for all time served on the original sentences and on all prior parole and probation violation sentences on these dockets."
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> [1] 18 [Pa.C.S.A.] § 3502(a).
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> [2] 18 [Pa.C.S.A.] § 903(a)(1).
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> [3] 18 [Pa.C.S.A.] § 3925(a).
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> [4] 18 [Pa.C.S.A.] § 3502(a).
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> [5] 18 [Pa.C.S.A.] § 3921(a).
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> [6] [Appellant]'s initial sentence on docket number [CP-36-CR-000]3465-2000 was illegal because the total period of supervision was longer than the statutory maximum period of incarceration for a felony of the third degree, which is seven years. ***See*** 18 Pa.C.S.A. § 1103. However, both [Appellant] and the Commonwealth agree that this illegality was cured at [Appellant]'s first Parole and Probation Violation Hearing.

Trial Court Opinion, 9/24/13, at 1-4 (citations to notes of testimony omitted; footnotes and quotation marks in original). Thereafter, on July 19, 2013, Appellant filed a timely notice of appeal.[1]

On appeal, Appellant raises the following issues for our review.

> I. Was an aggregate sentence of three and one half to seven years['] incarceration for a

[1] Appellant and the trial court have complied with Pa.R.A.P. 1925.

> probation/parole violation manifestly excessive and contrary to the fundamental norms underlying the sentencing process?
>
> II. Was the trial court's sentence of three and one half years to seven years on Information [CP-36-CR-000]3465-2000 for a felony of the third degree illegal because [Appellant] does not have seven years of eligible time remaining to serve because he successfully completed the parole portion of his original sentence?
>
> III. Did the trial court err and abuse its discretion in failing to give [Appellant] time credit for all time served on Informations [CP-36-CR-000]2498-2000 and [CP-36-CR-000]3562-2000 despite ordering that [Appellant] was to receive "credit for all time served to date on these dockets[]"[?]

Appellant's Brief at 5.

Our standard of review in assessing whether a trial court has erred in fashioning a sentence following the revocation of probation is well settled. The "[r]evocation of a probation sentence is a matter committed to the sound discretion of the trial court and that court's decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion." ***Commonwealth v. Williams***, 997 A.2d 1205, 1208 (Pa. Super. 2010) (citation omitted). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused." ***Commonwealth v. Burns***, 988 A.2d 684,

689 (Pa. Super. 2009) (*en banc*) (citation omitted), *appeal denied*, 8 A.3d 341 (Pa. 2010). "Our 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." ***Commonwealth v. MacGregor***, 912 A.2d 315, 317 (Pa. Super. 2006) (citations omitted). We also observe that, "whether an offender is serving a sentence of probation or intermediate punishment, if he violates the assigned conditions, the order of probation or intermediate punishment (as the case may be) may be revoked and a new sentence imposed." ***Commonwealth v. Wegley***, 829 A.2d 1148, 1153 (Pa. 2003) (citations omitted).

> [W]e must accord the sentencing court great weight as it is in the best position to view the defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime. … [A] sentence should not be disturbed where it is evident that the sentencing court was aware of sentencing considerations and weighed the considerations in a meaningful fashion.

Commonwealth v. Ahmad, 961 A.2d 884, 887 (Pa. Super. 2008)(citations and quotation marks omitted).

In his first issue, Appellant asserts that his "sentence of three and one half to seven years['] incarceration for a parole/probation violation was manifestly excessive." Appellant's Brief at 16. Specifically, Appellant argues that the trial court failed to consider his "strong need for rehabilitation." ***Id.*** at 16. Appellant further argues the trial court failed to impose an

individualized sentence that took into consideration his drug and alcohol dependency and prior criminal history. ***Id.***

Where an appellant challenges the discretionary aspects of his sentence, as is the case here, there is no automatic right to appeal, and an appellant's appeal should be considered a petition for allowance of appeal. ***Commonwealth v. W.H.M., Jr.***, 932 A.2d 155, 163 (Pa. Super. 2007). We will grant an appeal challenging the discretion of the sentencing court only where the appellant has advanced a colorable argument that the sentence is inconsistent with the Sentencing Code or contrary to the fundamental norms that underlie the sentencing process. ***Commonwealth v. Hyland***, 875 A.2d 1175, 1183 (Pa. Super. 2005) (citations and quotation marks omitted), *appeal denied*, 890 A.2d 1057 (Pa. 2005).

Prior to reaching the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine the following.

> (1) [W]hether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code. … [I]f the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case.

Commonwealth v. Edwards, 71 A.3d 323, 329-330 (Pa. Super. 2013) (citations omitted), *appeal denied*, 81 A.3d 75 (Pa. 2013).

Applying the four-factor test to the present matter, we conclude Appellant has complied with the first three requirements. Accordingly, we proceed to consider Appellant's Rule 2119(f) statement to determine whether he has presented a substantial question for our review. "A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the [sentencing] code or is contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (citation omitted), *appeal denied*, 13 A.3d 474 (Pa. 2010); ***see also*** 42 Pa.C.S.A. § 9781(b).

Instantly, our review reveals that Appellant has failed to present a substantial question for our review. This Court has long recognized that "a bald assertion that Appellant's sentence was excessive" does not raise a substantial question for our review. ***Commonwealth v. Fisher***, 47 A.3d 155, 159 (Pa. Super. 2012), *appeal denied*, 62 A.3d 378 (Pa. 2013). Likewise, "[a]n argument that the sentencing court failed to adequately consider mitigating factors in favor of a lesser sentence does not present a substantial question appropriate for our review." ***Commonwealth v. Ratushny***, 17 A.3d 1269, 1273 (Pa. Super. 2011); ***accord Commonwealth v. Moury***, 992 A.2d 162, 171 (Pa. Super. 2010). Rather, the weight to be afforded the various sentencing factors is a discretionary matter for the sentencing court and its determination will not be disturbed

simply because the defendant would have preferred that different weight be given to any particular factor. ***See e.g., Commonwealth v. Marts***, 889 A.2d 608, 615 (Pa. Super. 2005). Accordingly, we conclude Appellant is not entitled to appellate review of the discretionary aspects of his sentence.[2]

In his final two issues, Appellant challenges the legality of the June 20, 2013 judgment of sentence imposed following the revocation of his parole and probation. Appellant's Brief at 17. Specifically, Appellant avers the trial court erred in failing to ensure he was given credit for all time-served on docket numbers CP-36-CR-0002498-2000 and CP-36-CR-0003465-2000,

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[2] We recognize that "a claim that a particular probation revocation sentence is excessive in light of its underlying technical violations can present a [substantial] question that we should review." ***Commonwealth v. Carver***, 923 A.2d 495, 497 (Pa. Super. 2007) (citation omitted). As noted, however, Appellant does not make such an allegation in his Rule 2119(f) statement or his questions presented in his brief. ***See Commonwealth v. Provenzano***, 50 A.3d 148, 154 (Pa. Super. 2012) (stating, "we cannot look beyond the statement of questions presented and the prefatory 2119(f) statement to determine whether a substantial question exists[]").

Moreover, even if we were to reach the merits of Appellant's discretionary sentencing claims, they would nonetheless fail. Our review of the record reveals that the trial court properly considered all relevant factors in sentencing Appellant to an aggregate term of three and one-half to seven years' imprisonment following the revocation of his probation and parole and placed its reasoning on the record at the June 20, 2013 hearing. ***See*** N.T., 6/20/13, at 5-7; Trial Court Opinion, 9/24/13 at 7-8. Additionally, we note that the trial court considered and relied upon a PSI report. N.T., 6/20/13, at 6. When a trial court has the benefit of a PSI report, we presume that it "was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Walls***, 926 A.2d 957, 967 n.7 (Pa. 2007).

causing him to be subject to a term of incarceration greater than the statutory seven year maximum for a third-degree felony. ***Id.*** at 22-24; ***see also*** 18 Pa.C.S.A. § 1103(3) (stating, that "a person who has been convicted of a felony may be sentenced to imprisonment … [i]n the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years[]"). Appellant maintains that he is entitled to credit for two years less one day, "for the entire jail component of the original sentence (two years less one day), because [he] successfully walked of his parole, as well as the time [he] spent incarcerated on the prior violations[.]" Appellant's Brief at 26.

It is axiomatic that "challenges to an illegal sentence can never be waived and may be reviewed *sua sponte* by this Court." ***Commonwealth v. Tanner***, 61 A.3d 1043, 1046 (Pa. Super. 2013) (citation omitted). It is equally well established that Pennsylvania law does not tolerate an illegal sentence, for "[a] challenge to the legality of a sentence … may be entertained as long as the reviewing court has jurisdiction." ***Commonwealth v. Borovichka***, 18 A.3d 1242, 1254 (Pa. Super. 2011) (citation omitted). "If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction." ***Commonwealth v. Hopkins***, 67 A.3d 817, 821 (Pa. Super. 2013) (citation omitted), *appeal denied*, 78 A.3d 1090 (Pa. 2013). "An illegal sentence must be vacated." ***Id.*** "Issues relating to the legality of a sentence are

questions of law[; as a result, o]ur standard of review over such questions is *de novo,* and our scope of review is plenary." ***Commonwealth v. Delvalle***, 74 A.3d 1081, 1087 (Pa. Super. 2013) (citations omitted).

Instantly, Appellant avers that the trial court did not have the ability, upon revocation of his probation, to impose a sentence with a seven-year maximum, as Appellant had previously completed the incarceration and parole portion of his split-sentence. Appellant's Brief at 18. In support of this averment, Appellant relies on two prior opinions of this Court, ***Commonwealth v. Williams***, 662 A.2d 658 (Pa. Super. 1995), *appeal denied*, 674 A.2d 1071 (Pa. 1996), and ***Commonwealth v. Bowser***, 783 A.2d 348 (Pa. Super. 2001), *appeal denied*, 786 A.2d 1286 (Pa. 2002). Specifically, Appellant argues that pursuant to ***Williams*** the trial court was obligated to "mold the statutory maximum downward by a precise number of months and days until the maximum sentence was legal." Appellant's Brief at 19. Further, Appellant argues that the ***Williams*** Court "did not create a remedy that consisted of merely applying time credit to the minimum sentence." ***Id.*** Appellant supports this averment by citing ***Bowser*** as evidence that such a formula need not be applied where "the new sentence and the time served on the first component of the split sentence did not exceed the statutory maximum." ***Id.*** Accordingly, Appellant contends that the "rule created by ***Williams*** and ***Bowser*** requires the sentencing court to determine the amount of time that a defendant has previously 'served' on

the first component of the split sentence." ***Id.*** at 21. Appellant, however, misconstrues the holdings of these cases.

In sentencing a defendant, the trial court is bound by the following statutory provision mandating credit for time served.

> **§ 9760. Credit for time served.**
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> After reviewing the information submitted under [S]ection 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:
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> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.
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> (2) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts. This shall include credit in accordance with paragraph (1) of this section for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same act or acts.
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> …

42 Pa.C.S.A. § 9760.

In ***Williams***, the appellant was originally sentenced to 11½ months to 23 months' imprisonment, to be followed by a consecutive term of three years' probation, upon conviction of unlawful taking. ***Williams***, ***supra*** at

658. Williams served the minimum sentence of 11½ months and was then released on parole. ***Id.*** While on parole, he was convicted of a new crime. Parole was revoked, and Williams was sentenced to serve the remainder of the 23 months of the original sentence. ***Id.*** Thereafter, Williams was released on probation, and subsequently violated his probation based on a conviction for involuntary manslaughter. ***Id.*** The trial court resentenced Williams on the unlawful taking conviction to three and one-half to seven years' imprisonment, the statutory maximum, and only gave Williams credit for the period of incarceration on the probation detainer. ***Id.*** at 658-659. On appeal, this Court concluded the trial court's sentence of three and one-half to seven years' imprisonment, with credit only on the time served on the probation detainer, was illegal. ***Id.*** at 659. Accordingly, the ***Williams*** Court vacated Appellant's sentence and remanded for the trial court to resentence Williams to a statutory minimum and maximum that credited Williams with both the time incarcerated on the probation detainer and for the 23 months served on his split sentence prior to probation. ***Id.*** In doing so, this Court specifically set forth the months and days Williams was to be given credit for and calculated his minimum and maximum allowable sentence. ***Id.***

Nevertheless, the holding in ***Williams*** stands only for the rule that pursuant to Section 9760, an appellant must be given credit for time served in custody. The ***Williams*** Court was constrained to vacate the judgment of

sentence because the Department of Corrections was without the authority to correct Williams's sentence absence court order. ***See Commonwealth v. Mann***, 957 A.2d 746, 749 (Pa. Super. 2008) (stating "[t]he Department of Corrections, an executive agency, has no power to change sentences, or to add or remove sentencing conditions, including credit for time served; this power is vested in the sentencing court[]").

Herein, the trial court explicitly granted Appellant credit for "all time served on the original sentences and on all prior parole and probation violation sentences on these dockets." Trial Court Order, 7/10/13. Furthermore, the certified record contains a "Credit Checks" form stating Appellant is entitled to credit for the following periods of time.

- 6/15/00 to 8/11/00 (57 days)
- 5/22/03 to 1/29/04 (252 days)
- 3/22/05 to 3/23/05 (1 day)
- 5/22/10 to 7/1/10 (40 days)
- 11/24/10 to 5/24/11 (181 days)
- 2/21/12 to 3/15/12 (23 days)

Credit Checks Corrected, 8/15/13, at 1.

Therefore, Appellant's contention that he is entitled to two years less one day of credit for completing the parole portion of his initial sentence, while partially true, is also accounted for in the trial court's calculation of

credit for time served.[3] As noted, pursuant to Section 9760, Appellant is entitled to "[c]redit against the maximum term and any minimum term shall be given to the defendant for **all time spent in custody** as a result of the criminal charge for which a prison sentence is imposed[.]" 42 Pa.C.S.A. § 9760(1) (emphasis added). The trial court correctly included the portion of Appellant's original one year less one day, to two years less one day, sentence spent "in custody" in its calculation of credits for time served. Thus, we conclude that the trial court's revocation sentence of three and one-half to seven years' imprisonment was legally within the statutory maximum for third-degree felony because Appellant was appropriately awarded credit for all time served in custody.[4]

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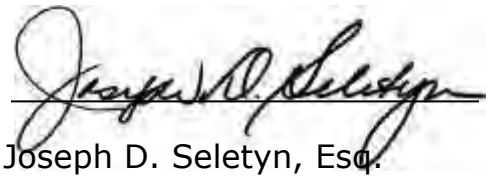
[3] We note that Appellant is not entitled to any credit for the period of time spent on parole after being released from custody, only for the portion of time spent in custody. ***See*** 42 Pa.C.S.A. § 9760(1), discussed ***infra***.

[4] A review of the certified record reveals the trial court has accurately calculated Appellant's periods of incarceration. The Department of Corrections (DOC) will, in turn, apply the periods of time in its calculation of Appellant's minimum and maximum sentences. Further, as the trial court notes, "both defense counsel and [the trial c]ourt have been in communication with all of the relevant record keepers and it now appears that [Appellant] has received all of the time credit to which he is entitled." Trial Court Opinion, 9/4/13, at 8. If Appellant finds error with the DOC's calculation, the appropriate remedy is to file a writ of mandamus in the Commonwealth Court. ***See McCray v. Pa. Dep't of Corr.***, 872 A.2d 1127, 1130-1131 (Pa. 2005) (holding a writ of mandamus is appropriate, "[w]here discretionary actions and criteria are not being contested, but rather the actions of the Department in computing an inmate's maximum and minimum dates of confinement are being challenged[]").

Accordingly, we affirm the trial court's June 20, 2013 judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/19/2014