

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JAMES T. WILLIAMS, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1504 WDA 2013

Appeal from the Judgment of Sentence entered August 20, 2013,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0012817-2011.

BEFORE: GANTMAN, P.J., ALLEN, and STABILE, JJ.

MEMORANDUM BY ALLEN, J.:

FILED APRIL 25, 2014

James T. Williams ("Appellant") appeals from the judgment of sentence entered following revocation of his probation. We affirm.

The pertinent facts and procedural history may be summarized as follows: On June 27, 2012, Appellant plead guilty to two counts of possession of a controlled substance with intent to deliver, and four counts of possession of a controlled substance, after Detective James Mikelonis of the Allegheny County Police Department searched Appellant's residence pursuant to a search warrant, and retrieved various controlled substances including ecstasy, benzyloperazine and marijuana. Affidavit of Probable Cause, 4/28/11; Trial Court Opinion, 1/14/14, at 1. The trial court sentenced Appellant to 3 years of probation on June 27, 2012.

On August 20, 2013, Appellant appeared before the trial court for a probation violation hearing, having incurred two separate convictions for possession of a controlled substance and terroristic threats, and having failed to pay court costs and refrain from drug use. At the conclusion of the hearing, the trial court revoked Appellant's probation and sentenced him to a term of imprisonment of 2½ to 5 years. Appellant filed a motion for reconsideration of his sentence on August 28, 2013, which the trial court denied on September 4, 2013. This timely appeal followed. Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant presents the following issue for our review:

1. DID THE SENTENCING COURT ABUSE ITS DISCRETION IN IMPOSING A MANIFESTLY EXCESSIVE AND UNREASONABLE SENTENCE FOLLOWING PROBATION REVOCATION, WHERE THAT SENTENCE WAS BASED WHOLLY ON THE VIOLATIVE CONDUCT, AND DID NOT ACCOUNT FOR APPELLANT'S MENTAL HEALTH, REHABILITATIVE NEEDS, AND THE UNIQUE CIRCUMSTANCES SURROUNDING HIS VIOLATION?

Appellant's Brief at 4.

Appellant argues that his sentence was manifestly unreasonable under the circumstances, and was based wholly on Appellant's "violative conduct." Appellant's Brief at 8. "[I]t is within our scope of review to consider challenges to the discretionary aspects of an appellant's sentence in an appeal following a revocation of probation." ***Commonwealth v. Ferguson***, 893 A.2d 735, 737 (Pa. Super. 2006) (citation omitted). However, a challenge to the discretionary aspects of a sentence is not appealable as of

right. Rather, Appellant must petition for allowance of appeal pursuant to 42 Pa.C.S.A. § 9781. ***Commonwealth v. Hanson***, 856 A.2d 1254, 1257 (Pa. Super. 2004).

Before we reach the merits of this [issue], we must engage in a four part analysis to determine: (1) whether 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. The third and fourth of these requirements arise because Appellant's attack on his sentence is not an appeal as of right. Rather, he must petition this Court, in his concise statement of reasons, to grant consideration of his appeal on the grounds that there is a substantial question. Finally, if the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case.

Commonwealth v. Austin, 66 A.3d 798, 808 (Pa. Super. 2013) (citations omitted); ***see also Commonwealth v. Kalichak***, 943 A.2d 285, 289 (Pa. Super. 2008) “([W]hen a court revokes probation and imposes a new sentence, a criminal defendant needs to preserve challenges to the discretionary aspects of that new sentence either by objecting during the revocation sentencing or by filing a post-sentence motion.”).

Here, Appellant preserved his claim on the record in his motion for reconsideration, and filed a timely notice of appeal. Appellant has additionally included in his brief a concise statement pursuant to Pa.R.A.P. 2119(f). See Appellant’s Brief 9-10. Moreover, Appellant’s claim that the trial court focused solely on the seriousness of his violative conduct raises a

substantial question for our review. **See *Commonwealth v. Simmons***, 56 A.3d 1280 (Pa. Super. 2012) (the appellant's claim that his sentence was manifestly excessive because the trial court only considered whether Appellant violated his probation, thereby depriving the appellant of an individualized sentence, raises a substantial question). Accordingly, we will review Appellant's claim.

Our standard of review in appeals of sentencing is well settled. We have explained:

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. 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 manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Simmons, 56 A.3d 1280, 1283-84 (Pa. Super. 2012).

In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference.

Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa. Super. 2003).

Upon revoking probation, a sentencing court may choose from any of the sentencing options that existed at the time of the original sentencing, including incarceration. 42 Pa.C.S.A. § 9771(b). “[U]pon revocation [of probation] ... the trial court is limited only by the maximum sentence that it

could have imposed originally at the time of the probationary sentence.” **Commonwealth v. Infante**, 63 A.3d 358, 365 (Pa. Super. 2013) (internal quotation marks and citations omitted). However, 42 Pa.C.S.A. § 9771(c) provides that once probation has been revoked, a sentence of total confinement may only 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 the court.

42 Pa.C.S.A. § 9771(c).

“In addition, in all cases where the court resentences an offender following revocation of probation ... the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed [and] [f]ailure to comply with these provisions shall be grounds for vacating the sentence or resentence and resentencing the defendant.” **Commonwealth v. Cartrette**, 83 A.3d 1030, 1040-1041 (Pa. Super. 2013) (internal quotations omitted); 42 Pa.C.S. § 9721(b). “A trial court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing

court's consideration of the facts of the crime and character of the offender.”
Commonwealth v. Crump, 995 A.2d 1280, 1282-1283 (Pa. Super. 2010).

The record indicates that Appellant was charged with violating his probation by incurring two new convictions for possession of a controlled substance and terroristic threats. At the sentencing hearing, the trial court explained the reasons for its sentence as follows:

[W]hen you pled guilty before me, you had a three prior record score which included a prior felony drug [charge]. You pled guilty for having MDMA, which is Ecstasy, and marijuana. You have since been convicted twice: Once for having 29 bags of heroin and once for threatening a victim and stealing \$400. ... [Y]ou are a two time convicted violator. Significant amounts of drugs have been involved, and you have at least three different instances of dealing drugs. You were in jail and [your] prior ... incarceration did not deter any criminal behavior.

I find that your combination of violence and drugs makes you a danger to the community and you are not a candidate for county supervision....

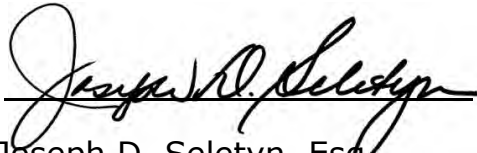
N.T., 8/20/13 at 4-5.

We ascertain no abuse of discretion in the trial court's rationale. Our review of the record supports the trial court's conclusion that a sentence of total confinement was warranted. As the trial court noted, Appellant had incurred new criminal convictions which would support a sentence of total confinement. *Id.* Moreover, the sentence was within the range of potential sentencing alternatives available to the court at Appellant's original conviction. Thus, the trial court did not impose an illegal sentence following the revocation of Appellant's probation. The record indicates that the trial

court considered the appropriate factors in rendering Appellant's sentence, including the circumstances of the offense, the impact of the crime on society, protection of the public, and Appellant's background and character and involvement with controlled substances, concluding that previous efforts to rehabilitate Appellant had not only failed but led to a continuation of criminal conduct. Appellant has failed to establish 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. ***Simmons, supra***. Appellant's discretionary claim therefore fails.

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: 4/25/2014