

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

SHAWN R. CARR

Appellant

No. 1699 WDA 2013

Appeal from the Judgment of Sentence September 18, 2013
In the Court of Common Pleas of Jefferson County
Criminal Division at No(s): CP-33-CR-0000026-2009;
CP-33-CR-0000125-2009; CP-33-CR-0000126-2009;
CP-33-CR-0000127-2009

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and OTT, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED JUNE 16, 2014

Appellant, Shawn R. Carr, appeals from the judgment of sentence entered in the Jefferson County Court of Common Pleas, following revocation of his probation. We affirm.

On February 17, 2010, Appellant pled guilty to four (4) counts of delivery of a controlled substance in Jefferson County.¹ That same day, the Jefferson County court sentenced Appellant on each count to fourteen (14) months' to three (3) years' imprisonment, followed by two (2) years' probation, with all sentences to run concurrently. While under supervision, Appellant committed new crimes in Clarion County. On August 14, 2013,

¹ 35 P.S. § 780-113(a)(30).

Appellant pled guilty in the Clarion County Court of Common Pleas to delivery of a controlled substance, drug delivery resulting in death, criminal use of communication, and abuse of a corpse.² The Clarion County court sentenced Appellant to eight (8) to sixteen (16) years' imprisonment.

The Jefferson County court held a **Gagnon II** revocation hearing on September 18, 2013, in which the court took judicial notice of Appellant's plea and sentence in Clarion County, and revoked his probation. The Jefferson County court resentenced Appellant to five (5) to (15) years' imprisonment on each count of delivery of a controlled substance, to run consecutively, for an aggregate of twenty (20) to sixty (60) years' imprisonment. The Jefferson County court also ordered the sentence to run consecutively to Appellant's Clarion County sentence.

Appellant filed a post-sentence motion for reconsideration on September 26, 2013, which the Jefferson County court denied on October 10, 2013. While still represented by counsel, Appellant filed several *pro se* post-sentence motions for modification and reconsideration, which the Jefferson County court denied.³ Appellant filed a timely notice of appeal on October 18, 2013. On October 22, 2013, the Jefferson County court ordered

² 35 P.S. § 780-113(a)(30), 18 Pa.C.S.A. §§ 2506(a), 7512(a), and 5510, respectively.

³ **See generally Commonwealth v. Jette**, 611 Pa. 166, 23 A.3d 1032 (2011) (reiterating rule that court will not consider *pro se* filings of defendant who is represented by counsel of record).

Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant timely complied on November 8, 2013.

Appellant raises the following issue for our review:

WHETHER THE [JEFFERSON COUNTY] COURT COMMITTED AN ABUSE OF DISCRETION BY RESENTENCING [APPELLANT] TO FOUR CONSECUTIVE SENTENCES AGGREGATING TO A MINIMUM OF TWENTY (20) YEARS TO A MAXIMUM OF SIXTY (60) YEARS IN A STATE CORRECTIONAL INSTITUTION GIVEN THE CIRCUMSTANCES OF THE CASE.

(Appellant's Brief at 4).

Appellant argues his aggregate revocation sentence of twenty (20) to sixty (60) years' imprisonment is excessive and manifestly unreasonable because, as a result, he will be incarcerated for a total of twenty-eight (28) to seventy-six (76) years, where the Jefferson County revocation sentence runs consecutive to the Clarion County sentence of eight (8) to sixteen (16) years' imprisonment. Appellant contends the Jefferson County Adult Probation Department's recommended sentence of five (5) to fifteen (15) years' imprisonment for Appellant's probation violation would have adequately addressed the factors of 42 Pa.C.S.A. § 9721(b), such as the protection of the public, the gravity of the offense, and the rehabilitative needs of Appellant. Appellant concludes this Court should vacate the revocation sentence and remand for appropriate sentencing because the Jefferson County consecutive revocation sentences are excessive, and the

Jefferson County court failed to state adequate reasons on the record for the severity of the revocation sentence. As presented, Appellant challenges the discretionary aspects of his revocation sentence. **See Commonwealth v. Dunphy**, 20 A.3d 1215 (Pa.Super. 2011) (stating claim that sentencing court failed to offer adequate reasons to support sentence challenges discretionary aspects of sentencing); **Commonwealth v. Prisk**, 13 A.3d 526 (Pa.Super. 2011) (stating generally allegations regarding sentencing court's imposition of consecutive or concurrent sentence challenges discretionary aspects of sentencing); **Commonwealth v. Lutes**, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

When reviewing the outcome of a revocation proceeding, this Court is limited to determining the validity of the proceeding and the legality of the judgment of sentence imposed. **Commonwealth v. Heilman**, 876 A.2d 1021 (Pa.Super. 2005). Notwithstanding the stated scope of review suggesting only the legality of a sentence is reviewable, an appellant may also challenge the discretionary aspects of a sentence imposed following revocation. **Commonwealth v. Sierra**, 752 A.2d 910 (Pa.Super. 2000). **See also Commonwealth v. Cappellini**, 690 A.2d 1220 (Pa.Super. 1997) (addressing discretionary aspects of sentence imposed following revocation of probation).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. **Commonwealth v. Sierra**, 752 A.2d 910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **See** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **See** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating a substantial question as to the appropriateness of the sentence under the Sentencing Code. **Commonwealth v. Mouzon**, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). The concise statement must indicate "where the sentence falls in relation to the sentencing guidelines and what particular provision of the code it violates." **Commonwealth v. Kiesel**, 854 A.2d 530, 532 (Pa.Super. 2004) (quoting **Commonwealth v. Goggins**, 748 A.2d 721, 727 (Pa.Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000)). "The requirement that an appellant separately set forth the reasons relied upon

for allowance of appeal 'furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases.'" **Commonwealth v. Williams**, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*).

[O]nly where the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process, will such a statement be deemed adequate to raise a substantial question so as to permit a grant of allowance of appeal of the discretionary aspects of the sentence. **See** [**Commonwealth v. Koehler**, 558 Pa. 334, 370, 737 A.2d 225, 244 (1999)] (party must articulate why sentence raises doubts that sentence was improper under the Sentencing Code).

Mouzon, supra at 435, 812 A.2d at 627.

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. **Commonwealth v. Anderson**, 830 A.2d 1013 (Pa.Super. 2003). 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." **Sierra, supra** at 912-13. A claim that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the

norms underlying the sentencing process. **Mouzon, supra** at 435, 812 A.2d at 627. Generally, any challenge to a sentencing court's imposition of a consecutive sentence, rather than a concurrent one, does not raise a substantial question. **Prisk, supra** at 533. Nevertheless, "[a]n allegation that a judge 'failed to offer specific reasons for [a] sentence does raise a substantial question.'" **Dunphy, supra** at 1222 (quoting **Commonwealth v. Reynolds**, 835 A.2d 720, 734 (Pa.Super. 2003)).

"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. Hoover**, 909 A.2d 321, 322 (Pa.Super. 2006). A sentence should not be disturbed where it is evident the court was aware of the appropriate sentencing considerations and weighed them in a meaningful fashion. **Commonwealth v. Fish**, 752 A.2d 921, 923 (Pa.Super. 2000).

The Sentencing Guidelines do not apply to sentences imposed following revocation of probation. **Commonwealth v. Ferguson**, 893 A.2d 735, 739 (Pa.Super. 2006), *appeal denied*, 588 Pa. 788, 906 A.2d 1196 (2006). "[U]pon sentencing following a 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. Coolbaugh**, 770 A.2d 788, 792 (Pa.Super. 2001). A court can sentence a defendant to total confinement after revoking probation if the defendant was

convicted of another crime, the defendant's conduct indicates that it is likely that he will commit another crime if he is not imprisoned, or such a sentence is essential to vindicate the court's authority. ***Commonwealth v. Crump***, 995 A.2d 1280 (Pa.Super. 2010), *appeal denied*, 608 Pa. 661, 13 A.3d 475 (2010).

Preliminarily we note Appellant failed to raise in his post-sentence motion his claim concerning the Jefferson County court's failure to state adequate reasons on the record for Appellant's revocation sentence. Therefore, this argument is waived. ***See Commonwealth v. Mann***, 820 A.2d 788 (Pa.Super. 2003) (stating issues that challenge discretionary aspects of sentencing are generally waived if they are not raised during sentencing proceedings or in post-sentence motion). Moreover, even if properly preserved, Appellant's brief concedes that the Jefferson County court enumerated its reasons for the sentence at the revocation hearing, including that Appellant's Clarion County violation offenses caused the death of a young woman. (Appellant's Brief at 10).

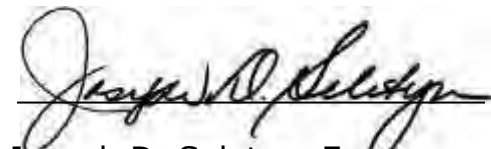
During the revocation hearing, the Jefferson County court took judicial notice of Appellant's plea and sentence in Clarion County. The Jefferson County court reviewed the post-sentence investigative ("PSI") report in the present case, as well as the PSI reports from Appellant's original sentence and the Clarion County sentence. Additionally, the Jefferson County court considered Appellant's age, prior record, and the Jefferson County Adult

Probation Department's recommendation. The Jefferson County court then revoked Appellant's probation and resentenced him after he had been convicted in Clarion County of delivery of a controlled substance, drug delivery resulting in death, criminal use of communication, and abuse of a corpse. **See Crump, supra.** Therefore, the record indicates the Jefferson County court was aware of the relevant sentencing considerations and weighed them in a meaningful fashion. **See Fish, supra.** Moreover, Appellant's argument that the Jefferson County court resentenced Appellant to a manifestly excessive sentence because it runs consecutive to the Clarion County sentence does not raise a substantial question. **See Mouzon, supra; Prisk, supra.** Based upon the foregoing, we conclude Appellant's revocation sentence should remain undisturbed. **See Hoover, supra.** Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

*PRESIDENT JUDGE EMERITUS BENDER FILES A DISSENTING STATEMENT.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/16/2014