

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

WILLIAM FRANKLIN DISANTO,

Appellant

No. 2102 MDA 2013

Appeal from the Judgment of Sentence Entered October 25, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0003584-2005

BEFORE: BENDER, P.J.E. MUNDY, J., and JENKINS, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED JUNE 19, 2014

Appellant, William Franklin DiSanto, appeals from the judgment of sentence of 11½ to 23 months' incarceration, followed by 2 years' probation, imposed after the revocation of his prior sentence of probation for the offense of corrupting a minor. Appellant solely challenges the legality of his sentence. After careful review, we affirm.

The trial court set forth the procedural history of this case as follows:

On November 15, 2005, [Appellant] pled guilty and pursuant to a negotiated plea agreement was sentenced as follows on one count of indecent assault of a person less than sixteen years of age and one count of corruption of minors:

Indecent Assault ... (M2)[:] Two Years['] Probation
Corruption of Minors (M1)[:] Five Years['] Probation

Following his first probation violation hearing on November 30, 2006, [Appellant] was sentenced ... on count two, corruption of minors, to a new term of five years['] probation.

[Appellant] was again found in violation of his probation on count two on December 3, 2009, at which time the [court] ...

revoked [Appellant's] probation and sentenced him to time served to twenty-three months['] incarceration, to be followed by a period of three years['] probation. According to Lancaster County Prison records, the time served from this second violation dated from September 13, 2009 through December 10, 2009 (approximately four months). [Appellant was released and served the remainder of his 23 month maximum sentence on parole. He then began serving his three year term of probation.]

On October 25, 2013, [Appellant] was again found to be in violation of the terms of his probation. On that date, the [court] sentenced [Appellant] as follows:

Corruption of Minors (M1)[:] Probation revoked, sentenced to eleven and one[-]half to twenty three months to be served at Lancaster County Prison, plus an additional two years of probation[.]

Trial Court Opinion, 12/23/13, at 1-2 (unnumbered pages; footnotes omitted).

Appellant filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he raises one issue for our review:

I. Was the trial court's sentence of [11½] ... to [23] months['] incarceration] plus two years['] probation ... for a misdemeanor of the first degree illegal because [Appellant] does not have 47 months of eligible time remaining to serve because he successfully completed the parole portion of his second violation sentence?

Appellant's Brief at 5.

Appellant's claim presents a challenge to the legality of his sentence. **See Commonwealth v. Foster**, 17 A.3d 332, 336 (Pa. 2011) (citation omitted) (stating "any claim, which asserts a sentence exceeds the lawful maximum, implicates the legality of the sentence"). "[T]he determination as

to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary.” ***Commonwealth v. Main***, 6 A.3d 1026, 1028 (Pa. Super. 2010) (citation omitted).

Furthermore, we note that “upon 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. Fish***, 752 A.2d 921, 923 (Pa. Super. 2000). Additionally, “[t]he defendant is not automatically granted credit for time served while incarcerated on the original sentence unless the court imposes a new sentence that would result in the defendant[’s] serving time in excess of the statutory maximum.” ***Commonwealth v. Infante***, 63 A.3d 358, 367 (Pa. Super. 2013) (citations and internal quotation marks omitted).

Here, on December 3, 2009, Appellant’s sentence of probation was revoked and he was resentenced to time served to 23 months’ incarceration. Appellant served this term as a “split” sentence, meaning that he was incarcerated for a portion of the 23 month maximum sentence, and was on parole for the remainder. Appellant contends on appeal that he is entitled to credit for all 23 months of this split sentence, despite the fact that he was on parole for the majority of it. He then asserts that his current sentence, when combined with his credit for 23 months of time served, exceeds the statutory maximum of five years’ incarceration permitted for the offense of corruption of a minor. **See** 18 Pa.C.S. § 6301(a)(1)(i) (classifying

corruption of minors as a misdemeanor of the first degree); 18 Pa.C.S. § 106(b)(6) (stating a person convicted of a misdemeanor of the first degree “may be sentenced to a term of imprisonment, the maximum of which is not more than five years”).

Appellant’s claim is meritless. Credit for time served is governed by 42 Pa.C.S. § 9760, which states, in pertinent part:

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

(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.

(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 re-prosecuted 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.

42 Pa.C.S. § 9760(1)-(2) (emphasis added).

In ***Commonwealth v. Kyle***, 874 A.2d 12 (2005), our Supreme Court held “that time spent subject to electronic monitoring at home is not time spent in ‘custody’ for purposes of credit under [42 Pa.C.S. §] 9760.” ***Id.*** at 22. The ***Kyle*** Court explained that Courts of this Commonwealth “have interpreted the word ‘custody,’ as used in Section 9760, to mean time spent

in an **institutional setting** such as, at a minimum, an inpatient alcohol treatment facility.” **Id.** at 18 (citations omitted; emphasis added).¹ Since **Kyle**, this Court has reiterated that,

credit for time served is generally reserved for situations where the defendant is “in custody.” **Commonwealth v. Stafford**, 29 A.3d 800 (Pa. Super. 2011). “Indeed, Pennsylvania appellate courts consistently have interpreted section 9760's reference to ‘custody’ as **confinement in prison or another institution.**” **Commonwealth v. Maxwell**, 932 A.2d 941, 944 (Pa. Super. 2007) (citations omitted)).

Commonwealth v. Martz, 42 A.3d 1142, 1145 (Pa. Super. 2012) (emphasis added).

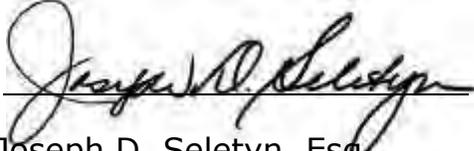
In this case, Appellant does not claim that he was subject to house arrest or placed in an institutional setting while serving his term of parole. Consequently, under the rationale expressed in **Kyle**, and this Court’s subsequent cases, we conclude that Appellant is not entitled to credit for the time he served on parole. Thus, Appellant’s current sentence of 11½ to 23 months’ imprisonment, followed by two years’ probation - combined with his credit for time served from September 13, 2009, through December 10, 2009 (approximately four months) - does not exceed the statutory maximum of 60 months’ incarceration.

Judgment of sentence affirmed.

¹ The Court did note that exceptions to the rule disallowing credit for time spent on house arrest “have been recognized[,]” but “only where equity was deemed to require it, such as when a defendant was assured that his time spent on electronic monitoring would count toward his sentence.” **Kyle**, 874 A.2d at 18 (citation omitted).

Judge Jenkins concurs in the result.

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: 6/19/2014