

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
EBONY MOORE,	:	
	:	
Appellant	:	No. 2109 MDA 2013

Appeal from the Judgment of Sentence November 13, 2013,
Court of Common Pleas, Lycoming County,
Criminal Division at No. CP-41-CR-0000856-2011

BEFORE: DONOHUE, WECHT and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED JUNE 06, 2014

Ebony Moore (“Moore”) appeals from the judgment of sentence of 25 to 60 months of incarceration, entered following the revocation of a sentence of probation. Following our review, we affirm.

We begin with the trial court’s apt summary of the facts underlying this appeal:

On July 25, 2011, [Moore] pled guilty to one count of Retail Theft, a felony of the third degree. On the same day, [Moore] was sentenced to [36] months of supervision with the Adult Probation Office of Lycoming County. A special condition of the supervision was that [Moore] was to attend and successfully complete the Drug Court Program.

On November 30, 2011, [Moore] was detained in the Lycoming County Prison (Prison) for missing an appointment at West Branch Drug and Alcohol Abuse Commission (West Branch). On December 14, 2011, [Moore] was sanctioned [50] hours of community service. On January 4, 2012, [Moore] again missed

*Retired Senior Judge assigned to the Superior Court.

her scheduled counseling and was detained in the Prison. On January 11, 2012, [Moore] was sanctioned to [14] days in the Prison, a [60] day phase extension with the Drug Court program, and to attend an additional [90] meetings in ninety [90] days. On February 8, 2012, [Moore] missed another appointment with West Branch and was sanctioned with four [] consecutive Saturdays of community service.

On November 13, 2013, following a Final IP Violation Hearing, this [c]ourt [] revoked [Moore's] Retail Theft sentence and re-sentenced her to twenty-five (25) months to five (5) years in a State Correctional Institution. The Court did not take further action under docket number 1224-2010. [Moore] filed a Post-Sentence Motion on November 14, 2013, which was denied by this Court.

On November 27, 2013, the Defendant timely filed a Notice of Appeal[.]

Trial Court Opinion, 1/30/14, at 1-2.

Moore presents only one issue for our review: "Whether the sentencing court abused its discretion by imposing a manifestly unreasonable and excessive state sentence without considering the fundamental norms underlying the sentencing process." Appellant's Brief at 6. "Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right." ***Commonwealth v. Allen***, 24 A.3d 1058, 1064 (Pa. Super. 2011) (citation omitted).

An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test: (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).

Id.

As noted above, Moore filed a timely notice of appeal, and the record reveals that she preserved this issue by raising it in her post-sentence motion. She has included a statement pursuant to Pa.R.A.P. 2119(f) in her brief, in which she alleges that the sentence was inconsistent with the fundamental norms underlying the sentencing process because the trial court did not consider "all relevant factors" as well as "how a lengthy period of state prison would further [her] rehabilitative needs ... [or] the protection of the public." Appellant's Brief at 12. This statement raises a substantial question that her sentence is not appropriate under the Sentencing Code, and so we will review Moore's claim. **See Commonwealth v. Riggs**, 63 A.3d 780, 786 (Pa. Super. 2012), *appeal denied*, 63 A.3d 776 (Pa. 2013) (holding that appellant presents a substantial question so as to invoke our review when he alleges that trial court failed to consider relevant sentencing criteria, including appellant's rehabilitative needs).

Our standard of review for sentencing claims is as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. More specifically, 42 Pa.C.S.A. § 9721(b) offers the following guidance to the trial court's sentencing determination: '[T]he sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.' 42 Pa.C.S.A. § 9721(b). Thus, under 42 Pa.C.S.A. § 9721(b), a sentencing court must formulate a sentence individualized to that particular case and that particular defendant.

Commonwealth v. Clarke, 70 A.3d 1281, 1287 (Pa. Super. 2013) (internal citations omitted).

A trial court must adhere to certain requirements when imposing a sentence:

[T]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. ... In every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resents an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resents following remand, 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.

42 Pa.C.S.A. § 9721(b).

Moore argues that the trial court did not address how the sentence imposed “would contribute to the rehabilitative needs of [Moore], the gravity of the offense, or the protection of the public.” Appellant’s Brief at 9. Moore contends that the sentence is excessive for violations that “were technical in nature and stemmed from her inability to pay court costs and fines and her inability to pay for court ordered treatment.” *Id.* at 9-10.¹

The record reveals that Moore violated her probation by repeatedly failing to report to her probation officer, failing to participate in counseling, and producing a positive drug screen. N.T., 11/13/13, at 4-8. At the hearing, Moore claimed that she did not attend counseling sessions because she was unable to pay for them. *Id.* at 7-8. Moore had previously violated other probationary sentences, but was given community service and other alternative punishments “to try and motivate [] Moore to get this together[.]” *Id.* at 6. Between 2007 and November 2013, Moore was committed to the county prison 14 times. *Id.* At sentencing, the trial court recognized that the violations at issue were technical, but found that Moore’s extensive history of violations, and her unwillingness to take advantage of

¹ Moore also states that her sentence is “outside the aggravated range for the offense”, ostensibly as *de facto* support for her claim that the sentence is excessive. Appellant’s Brief at 9-10. We point out, however that “the sentencing guidelines do not apply to sentences imposed as a result of probation or parole revocations.” *Commonwealth v. Ware*, 737 A.2d 251, 255 (Pa. Super. 1999).

the more lenient sentences that had been imposed in the past, as well as her failure to take steps to avoid the technical violations, as proof that Moore is not amenable to an intermediate punishment sentence. **See id.** at 8, 10-11.

For instance, the trial court stated,

To me this is a complete attitude issue. This is[,] you needed to report and you didn't report. ... You failed to report. You used controlled substance [*sic*]. You didn't talk to Mr. Page and say I can't make \$70 a month because I owe money to Mr. Whitman and Mr. Carn. Can you lower the payment? They do that.

You're missing the point where if you find yourself in problems or in difficulties with payments if you reach out to whoever the MDJ is and ask them that's when you get some relief. You can't just turn your back on them and not pay And so I'm in a position where I'm looking at your whole history, your whole supervision history. I'm looking at what Judge Anderson did and even what he said was looking upon the facts in the light most favorable to [Moore] all violations were technical in nature and that she did not commit new crimes and she did not relapse. So he chose to sentence you to county time based upon those two - basically those two things saying that your history of supervision didn't warrant you being sentenced to state prison. To me he gave you the last chance to stay in county by saying that technical violations up 'til that point didn't justify. So now what am I faced with? I am faced with a relapse. I am faced with yet again absconding from supervision... . But at this point there comes a time where we have to say, enough is enough and as I said, I can hear you - I don't believe that you're a bad person[,] ... but I think you're misguided by the fact that when you're in the system that you can pick and choose what you want to do[.]

I believe that to sentence you to anything different [than a period of incarceration] depreciates the seriousness of the just systematic probation, intermediate punishment violations that you've had, that Judge Anderson gave you a huge opportunity in May of 2012 and I believe based on your track record for the most part you squandered that opportunity

Id. at 18, 24-25, 27.

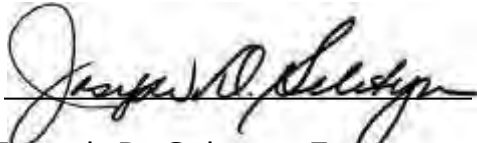
Thus, the record belies Moore's claim that the trial court did not consider her rehabilitative needs. As evident from the quote above, the trial court considered Moore's history of intermediate punishment sentences and her numerous violations thereof, and was firmly of the mind that a sentence other than incarceration would not help Moore reform her ways.² Furthermore, the trial court recognized that it was sentencing Moore on a conviction of retail theft graded as a third-degree felony, and it was aware of the guideline ranges that were applicable at the time of Moore's initial sentencing, as well as the statutory maximum. **Id.** at 2, 11-12, 25. The trial court's acknowledgment of these aspects indicates its consideration of the gravity of the offense and whether there is a need for protection of the

² To the extent that Moore is claiming that the trial court did not consider her need for rehabilitation related to a substance abuse problem, we cannot agree. On the contrary, the trial court concluded that Moore did not have a problem that would require admission into a rehabilitation program. When Moore asked the trial court about the possibility of rehab, the trial court pointed out that up to that point, Moore had steadfastly denied any substance abuse problems and stated that she was not using controlled substances. N.T., 11/13/13, at 26. The trial court found Moore's inquiry into rehab programs as another attempt by Moore to "avoid accountability." **Id.**

public. We are satisfied that the trial court considered the factors it was required to consider pursuant to 42 Pa.C.S.A. § 9721(b). Having found no merit to Moore's challenge, we affirm.

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: 6/6/2014