

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RICKY MYERS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3051 EDA 2012

Appeal from the PCRA Order of October 12, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0016366-2009

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STABILE, JJ.

MEMORANDUM BY OLSON, J.:

FILED JULY 03, 2014

Appellant, Ricky Myers, appeals *pro se* from the order entered on October 12, 2012, dismissing his first petition filed under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The material facts and procedural history of this case are as follows. On April 8, 2010, Appellant entered an open guilty plea to one count of second-degree aggravated assault and one count of possession of an instrument of crime as a first-degree misdemeanor.¹ On June 24, 2010, the trial court imposed a sentence of 96 months' probation (84 months reporting) and \$550.00 in restitution for aggravated assault, together with

¹ 18 Pa.C.S.A. § 2702 (a) and § 907, respectively.

60 months of concurrent reporting probation and a \$40.00 fine for possessing an instrument of crime.

On August 13, 2010, Philadelphia police arrested Appellant for attempted robbery, conspiracy, possession of an instrument of crime, and tampering with physical evidence. On September 10, 2010, the trial court held a preliminary hearing on Appellant's new charges. Thereafter, on November 10, 2010, the trial court convened a ***Daisy Kates***² hearing to determine whether Appellant violated the terms of his probation. At the November 10, 2010 hearing, the Commonwealth called the victim of the attempted robbery, as well as an investigating officer. Additional evidence introduced at the hearing showed that Appellant tested positive for marijuana use on August 5, 2010. At the conclusion of the hearing, the trial court found by a preponderance of the evidence that Appellant was in direct violation of his probation. NT, 11/10/10, at 28-30. Accordingly, the court ordered a mental health evaluation and presentence investigation report. Thereafter, the court re-sentenced Appellant on December 15, 2010 to 60 to 120 months' incarceration for aggravated assault followed by a consecutive sentence of 12 to 48 months' imprisonment for possessing an instrument of

² ***Commonwealth v. Kates***, 305 A.2d 701, 708-709 (Pa. 1973). In ***Kates***, our Supreme Court held that when a probationer has been charged with a new offense, his probation may be revoked prior to a trial on the new charge so long as the court supervising the probationer holds a hearing on the matter. ***Id.***

crime. Appellant filed a motion to reconsider his sentence on December 23, 2010, which the trial court denied on February 14, 2011. Appellant did not file a direct appeal.

After he was sentenced for violating his probation, Appellant went to trial on the attempted robbery and related charges. On May 2, 2011, a jury acquitted Appellant on all counts.

Appellant filed a *pro se* PCRA petition on May 12, 2011. The PCRA court appointed counsel and, on December 15, 2011, counsel filed an amended petition. The Commonwealth moved to dismiss Appellant's petition on June 7, 2012. Pursuant to Pa.R.Crim.P. 907, the PCRA court issued notice of its intent to dismiss Appellant's PCRA petition on September 12, 2012. The court formally dismissed Appellant's petition on October 12, 2012.

On October 25, 2012, Appellant filed a *pro se* notice of appeal pursuant to Pa.R.A.P. 1925(b). The PCRA court ordered Appellant to file a concise statement of errors complained of on appeal on November 20, 2012. On November 29, 2012, Appellant filed and served his concise statement. The PCRA court issued its Rule 1925(a) opinion on February 4, 2013.³

³ On June 13, 2013, the Commonwealth moved to stay appellate proceedings and for a remand in order to verify the status of Appellant's counsel. By *per curiam* order entered on July 16, 2013, this Court granted the Commonwealth's remand motion and directed the PCRA court to conduct a hearing to ascertain whether Appellant's counsel remained attached to this case and whether Appellant had expressed a knowing, intelligent, and (*Footnote Continued Next Page*)

Appellant now raises the following claims for our review:

[1] Did the trial court err when it violated Appellant prematurely [sic]?

[2] Did the trial court err when Appellant never violated conditions of probation?

[3] Is the trial court's sentence excessive for non-violation?

Appellant's Brief at 4.

Appellant's first two claims are closely related; hence, we shall address them together. Essentially, in developing these claims, Appellant asserts that the PCRA court erred in dismissing his petition because his May 2, 2011 acquittal demonstrated that his probation was revoked prematurely and that the evidence upon which the trial court relied in revoking his probation lacked sufficient probative value to establish either a direct or a technical violation. These claims are both waived and meritless.

We "review an order granting or denying PCRA relief to determine whether the PCRA court's decision is supported by evidence of record and whether its decision is free from legal error." ***Commonwealth v. Liebel***, 825 A.2d 630, 632 (Pa. 2003).

(Footnote Continued) _____

voluntary desire to proceed *pro se* under ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998). By order dated December 16, 2013, the PCRA court released counsel, finding that Appellant relinquished his right to representation in a knowing, intelligent, and voluntary manner.

Under 42 Pa.C.S.A. § 9543(a)(3), a petitioner must show that his allegations of error have not been previously litigated or waived. Pursuant to § 9544(b), “an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding.” 42 Pa.C.S.A. § 9544(b). In his first two claims, Appellant challenges the timing of his revocation proceeding and the sufficiency of the evidence offered to establish a violation of his probation. Neither contention is raised in the context of a claim asserting that counsel was ineffective. Because these issues could have been raised at prior proceedings or on direct appeal, they are waived for purposes of the present collateral proceedings.

Even if we were to reach the substance of Appellant’s first two claims, we would conclude that Appellant is not entitled to relief. In assessing the validity of the revocation proceedings, we apply the following principles articulated by our Supreme Court:

The primary concern of probation, as well as parole, is the rehabilitation and restoration of the individual to a useful life. It is a suspended sentence of incarceration served upon such lawful terms and conditions as imposed by the sentencing court. It requires only a truncated hearing by the sentencing court to determine whether probation remains rehabilitative and continues to deter future antisocial conduct. The purpose of the revocation hearing is simply to establish to the satisfaction of the judge who granted probation that the individual's conduct warrants his continuing as a probationer. The controlling consideration at a [revocation] hearing is whether the facts presented to the court are probative and reliable and not whether traditional rules of procedure have been strictly

observed. Such a hearing takes place without a jury, with a lower burden of proof, and with fewer due process protections.

Commonwealth v. Mullins, 918 A.2d 82, 85 (Pa. 2007) (internal quotations and citations omitted).

On September 10, 2010, the trial court conducted a preliminary hearing on Appellant's new charges involving attempted robbery and related offenses. Ultimately, those charges were bound over for trial. This initial preliminary hearing served as Appellant's **Gagnon I** hearing. **See Gagnon v. Scarpelli**, 411 U.S. 778 (1973); **see also Commonwealth v. Davis**, 336 A.2d 616, 622 (Pa. Super. 1975) (where a preliminary hearing has been held on a probationer's new offense, there is no need for a **Gagnon I** hearing). The subsequent **Daisy Kates** hearing held on November 10, 2010 found that Appellant was in violation of his probation and the court re-sentenced him to incarceration. **See Kates, supra**. Based upon our review of the notes of testimony from Appellant's revocation hearing, the Commonwealth introduced ample evidence to support the trial court's determination that Appellant was in direct violation of the terms of his probation and that probation no longer represented a viable means of deterring antisocial conduct on Appellant's part. As the Commonwealth correctly points out, because a revocation hearing differs substantially from a criminal trial, Appellant's subsequent acquittal does not defeat the validity of the trial court's order revoking Appellant's probation. Thus, Appellant's first two claims fail.

In his third claim, Appellant alleges that the trial court's sentence is excessive because he "was not given proper due process." Appellant's Brief at 12. Specifically, Appellant claims, without support, that "he was not provided with written notice of the claimed violations of [probation], the court failed to disclose evidence against Appellant, did not provide Appellant the opportunity to present witnesses and documentary evidence, nor provide Appellant the right to confront and cross-examine adverse witnesses." **Id.** This boilerplate claim is belied by the record and merits no relief.

As a preliminary matter, we find that substantial defects in Appellant's brief hamper meaningful review of this issue. The Pennsylvania Rules of Appellate Procedure set forth mandatory briefing requirements for litigants presenting their claims before this Court. **See** Pa.R.A.P. 2101. Briefs filed with this Court must contain an argument section that develops claims through meaningful discussion supported by pertinent legal authority and citations to the record. Pa.R.A.P. 2111(a)(8); Pa.R.A.P. 2119. We may quash or dismiss an appeal where an appellant fails to comply with the briefing requirements of our appellate rules. Pa.R.A.P. 2102; **see also** **Commonwealth v. Adams**, 882 A.2d 496, 497-498 (Pa. Super. 2005) (Superior Court may quash or dismiss appeals where non-conforming briefs have been filed). "Although the Superior Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit

upon the appellant.” **Id.** at 498. Since Appellant has failed to develop a due process violation in his brief, he has waived this claim.

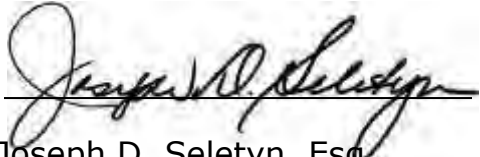
To the extent that Appellant’s sentencing challenge can be read as an objection to the discretionary aspects of his punishment,⁴ we note that such a claim is not cognizable under the PCRA. **See Commonwealth v. Fowler**, 930 A.2d 586, 593 (Pa. Super. 2007) (“Challenges to the discretionary aspects of sentencing are not cognizable under the PCRA.”), *appeal denied*, 944 A.2d 756 (Pa. 2008); 42 Pa.C.S.A. § 9543(a)(2)(vii). Moreover, our review of the record confirms that Appellant received notice of the allegations against him and that he had the opportunity to confront the witnesses who offered testimony against him. For these reasons, Appellant’s final claim merits no relief.

Order affirmed.

⁴ Appellant does not allege that the trial court’s sentence was contrary to a statutory provision or that it subjected him to double jeopardy. Thus, we do not view Appellant’s claim as a challenge to the legality of his sentence. **See Fowler**, 930 A.2d at 592 (claim challenges legality of sentence where appellant asserts that statute bars court from imposing sentence or where sentence subjects defendant to double jeopardy).

J-S33020-14

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: 7/3/2014