NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. QUINTEZ TALLEY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3394 EDA 2012

Appeal from the Judgment of Sentence entered October 24, 2013, in the Court of Common Pleas of Philadelphia County, Criminal Division, at No(s): CP-51-CR-1005311-2004, CP-51-CR-0503081-2005 and CP-51-CR-0807941-2005.

BEFORE: ALLEN, MUNDY, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED MAY 23, 2014**

Quintez Talley ("Appellant") appeals from the judgment of sentence imposed following revocation of his parole and probation.

The trial court summarized the pertinent facts and procedural history as follows:

> On August 30, 2005, [Appellant] appeared before [the trial court] and pled guilty to two counts of possession with intent to deliver a controlled substance (PWID), receiving stolen property (RSP), and knowing and intentional possession of controlled substances (K&I). Pursuant to his negotiated plea agreement, [the trial court] sentenced him to one year in the county Intermediate Punishment (IP) program, to include inpatient drug treatment at Self Help Movement and 3 months of house arrest, plus 2 years reporting probation. [Appellant] was ordered to complete 40 hours of community service, earn his GED, and seek and maintain employment.

*Former Justice specially assigned to the Superior Court.

> Ten days after entering inpatient drug treatment, [Appellant] left the facility to perform community service and never returned. On October 5, 2005, [Appellant] was arrested and charged with PWID. On October 29, 2005, he was arrested and charged with robbery and related charges. [Appellant] failed to appear at any of his scheduled court dates and wanted cards were issued. These charges were later withdrawn. On June 7, 2006, [Appellant] was arrested and charged with attempted murder, aggravated assault, violations of the Uniform Firearms Act (VUFA), and several related charges. He appeared before the Honorable Glenn B. Bronson and on February 7, 2007, he was found not guilty of these charges.
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> On March 20, 2007, [Appellant] appeared before [the trial court] for a violation of probation hearing. [The trial court] found [Appellant] in technical violation for absconding from supervision and failing to satisfy any of the terms and conditions of his sentence. [The trial court] sentenced him to 11½ to 23 months county incarceration plus 3 years reporting probation, to run concurrent on the two PWID charges and the RSP charge. No further penalty was imposed on the K&I. Appellant was ordered to complete 90 days in the Options drug treatment program, earn his GED, and receive vocational training.
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> On November 11, 2007, [the trial court] signed a petition to release [Appellant] on parole; however, he was never released from custody.[1] On March 12, 2008, he was arrested in prison and charged with aggravated assault and related charges for fighting with another inmate. On October 9, 2008, he was found guilty of these charges. On December 4, 2008, he appeared before the Honorable Michael Erdos and was sentenced to 18 to 36 months state incarceration plus 2 years reporting probation.
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> On December 10, 2008, [Appellant] was arrested in prison for attempting to set his jail cell on fire. He was charged with arson, risking catastrophe, institutional vandalism, recklessly

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[1] At the October 24, 2012 probation revocation hearing, the trial court explained that it had granted Appellant parole effective November 11, 2007. N.T., 10/24/12, at 8-12. However, Appellant's counsel stated, and the Commonwealth agreed, that Appellant was never released from custody. *Id*.

> endangering another person, and failure to prevent catastrophe. On June 8, 2012, he was found guilty of these charges. He [was] scheduled to appear before the Honorable William J. Mazzola on June 21, 2013 for sentencing.
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> On February 24, 2012, [Appellant] was arrested in prison after head butting a correctional officer and was charged with aggravated assault, simple assault, and recklessly endangering another person. ... . [T]rial before the Honorable Joan A. Brown [was] scheduled for June 19, 2013.
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> On October 24, 2012, [Appellant] appeared before [the trial court] for his second violation of probation hearing.
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> [The trial court] found [Appellant] in direct violation and, as a result, terminated his parole and revoked his probation. [Appellant] was sentenced to 3 to 6 years state incarceration on both of his PWID charges, and 1½ to 3 years state incarceration on the RSP charge, to run consecutively with one another, with credit for time served. This resulted in an aggregate sentence of 7½ to 15 years state incarceration.[2] [The trial court] ordered

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[2] At the October 24, 2012, probation revocation hearing, Appellant's counsel requested that since Appellant was never released on parole, the trial court give Appellant credit for some of the time Appellant served in custody. *Id*. at 8-12. In imposing its sentence, the trial court expressly stated:

> This sentence takes into consideration that [Appellant] may have up to four years of credit on my sentence for previous terms of jail.
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> I have given [Appellant] up to four years of credit based upon prior terms of incarceration under my sentence, whether that was before he entered the pleas or sometime in between up to today's date.
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> Therefore, I have sentenced him on what I believe to be the balance on each case. And I believe the balance on each case for the two PWID's to be 6 years each. And the balance on the receiving stolen property to be 3 years. All these sentences are

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> [Appellant] to receive treatment for his mental health issues, drug addiction, and anger management problem. She further ordered him to complete a vocational training program and pay $25 per month toward fines, costs, and supervision fees. [The trial court] noted that [Appellant] possibly had up to 4 years of time credit based upon the time he already had been imprisoned on [the trial court's] sentence.
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> On November 6, 2012, [Appellant] filed a Petition to Vacate and Reconsider Sentence *nunc pro tunc*. On November 26, 2012, he filed a Notice of Appeal to Superior Court.

Trial Court Opinion, 5/24/13, at 1-5 (citations to notes of testimony omitted).

Appellant presents one issue for our review:

> Was not [Appellant's] sentence of seven and one-half to fifteen years incarceration for his violation of probation excessive and unreasonable?

Appellant's Brief at 4.

Appellant challenges the discretionary aspects of the sentence imposed after his probation was revoked. A discretionary challenge is not appealable as of right. Rather, Appellant must petition for allowance of appeal pursuant

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> minus the 4 years, which may or may not be what [Appellant] has already served. But I'm going to calculate it in that fashion so that his sentence of 7½ to 15 years is absolutely appropriate under the circumstances given the circumstances upon which [Appellant] has committed these new crimes.

Id. at 24-27.

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).

Here, the record reflects that an untimely post-sentence "*Petition to Vacate and Reconsider Sentence nunc pro tunc"* was filed on November 6, 2012. ***Commonwealth v. Mann***, 820 A.2d 788, 794 (Pa. Super. 2003). That same day, the trial court approved the *nunc pro tunc* filing, but denied Appellant's motion for reconsideration. Thus, Appellant appropriately preserved his discretionary claim. Additionally, Appellant filed a timely notice of appeal, and has included in his brief a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 2119(f). *See* Appellant's Brief at 9-11. We therefore proceed to determine whether Appellant has raised a substantial question for our review.

Appellant argues that the trial court imposed an excessively severe sentence without carefully considering all the relevant factors set forth in 42 Pa.C.S.A. § 9721(b), and failed to provide adequate reasons on the record for such a sentence. *Id*. Such a claim raises a substantial question for our review. ***See Commonwealth v. Kelly***, 33 A.2d 638, 640 (Pa. Super. 2011) (a claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question for our review); ***Commonwealth v. Parlante***, 823 A.2d 927, 929 (Pa. Super. 2003) (a claim that the trial court imposed an excessive sentence without considering the defendant's background or nature of offenses or providing adequate reasons on the record for the sentence raises a substantial question).

In reviewing such a discretionary claim, we are guided by the following principles: "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), *appeal granted*, 75 A.3d 484 (Pa. 2013) (citation omitted).

> The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the

> individual circumstances before it. Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed.

Commonwealth v. Walls, 926 A.2d 957, 961 (Pa. 2007) (citations and internal quotations omitted).

On appeal following the revocation of probation, "[o]ur review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that it had at the time of the initial sentencing. Also, 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." ***Simmons***, 56 A.3d at 1286–1287.

In general, "[t]he proper standard of review for an appellate court is to focus on the pertinent statutory provisions in the Sentencing Code, specifically 42 Pa.C.S. § 9781(c) and (d), and 42 Pa.C.S. § 9721(b). We also consider a sentence imposed following revocation of probation in light of the limitations set forth in 42 Pa.C.S. § 9771(c)[3]. Because subsections

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[3] 42 Pa.C.S.A. § 9771(c)

Limitation on sentence of total confinement.- The court shall not impose a sentence of total confinement upon revocation unless it finds that:

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9781(c) and (d) include a focus on sentencing guidelines, however, and because sentencing guidelines do not apply to sentences imposed following a revocation of probation, in [such probation revocation] case[s] we look solely to the provisions of 42 Pa.C.S. § 9721(b)." ***Commonwealth v. Williams***, 69 A.3d 735, 741 (Pa. Super. 2013).

Section 9721(b) provides in pertinent part:

> [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.

42 Pa.C.S. § 9721(b).

Generally, our review of a sentence is limited in these circumstances to whether the sentencing court explicitly or implicitly considered the section 9721(b) factors, and we may not re-weigh the significance placed on each factor by the sentencing judge. Given such a deferential standard of review, our Supreme Court recognized that "rejection of a sentencing court's imposition of sentence on unreasonableness grounds ... occur[s]

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> (1) the defendant has been convicted of another crime; or
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> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
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> (3) such a sentence is essential to vindicate the authority of the court.

infrequently[.]" ***Williams*** 69 A.3d at 742 *citing* ***Walls***, 926 A.2d at 964, 966.

Here, at the sentencing hearing, the trial court recounted in detail Appellant's prior record, noting that Appellant had twice received new convictions, the first for aggravated assault and the second for arson. N.T., 10/24/12, at 5-7. The trial court additionally noted that Appellant had been enrolled in treatment programs to rehabilitate him, but that such attempts at rehabilitation had not only failed but led to a continuation of criminal conduct. *Id.* at 4-9. The trial court then heard statements from Appellant's counsel, who expounded in detail on Appellant's mental health problems, and also heard from Appellant, who emphasized that he had attained his GED while in prison, that he suffered from mental health problems, and indicated a desire to improve himself. *Id*. at 13-18; 22-24.

In imposing its sentence, the trial court explained that it had "taken into consideration what defense counsel said about mental health issues" and, "[took] into consideration [Appellant's] entire history and obviously [his] anger management issues that are unresolved" and specifically included in its sentence a provision that Appellant "is to get mental health, drug, and anger management treatment while in jail." *Id*. at 24-25. Although Appellant argues that his mental health problems should have resulted in a lesser sentence, "[while] [m]ental illness is clearly a factor that may be considered in sentencing ... it does not mandate a modification or reduction in any sentence that would or could be imposed," and we will not substitute our judgment of that of the sentencing court. ***Commonwealth v. Diaz***, 867 A.2d 1285, 1287 (Pa. Super. 2005). As the trial court explained in its Pa.R.A.P. 1925(a) opinion:

> [Appellant's] sentence was within the statutory limits and was reasonable in light of all the relevant factors. [T]he length of incarceration was solely within the [trial court's] discretion and [the trial court] was limited only by the maximum sentence that it could have imposed at the original sentencing. Under Pennsylvania law, the maximum sentence for possession with intent to deliver a controlled substance, an ungraded felony, is 10 years. The maximum sentence for receiving stolen property, graded as a felony of the third degree, is 7 years. The sentence imposed was well within the statutory limits and was a reasonable exercise of [the trial court's] discretion in light of [Appellant's] criminal history, including new convictions for arson and aggravated assault, which he committed while imprisoned; failure to comply with the terms and conditions of probation and house arrest, and utter failure to make any sincere effort to rehabilitate himself while serving [the trial court's] sentence.
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> When making this determination, [the trial court] considered all relevant information about [Appellant] that was available [including] [Appellant's] criminal history on the record, listened to recommendations by defense counsel and the Commonwealth, and heard what [Appellant] had to say on his own behalf. After taking all of this into consideration, [the trial court] found it appropriate to sentence [Appellant] to a term of state incarceration. ... [T]here is no requirement that [the trial court] impose the "minimum possible sentence." Rather based upon [Appellant's] ongoing failure to take adequate measures to rehabilitate himself through various county programs, [the trial court] found it appropriate to sentence Appellant to 7½ to 15 years state incarceration.

Trial Court Opinion, 5/24/13, at 8-9.

Given the foregoing, the trial court appropriately considered the sentencing factors, including Appellant's mental health needs, in fashioning its sentence. The trial court's sentence was neither manifestly unreasonable, nor the result of partiality, prejudice, bias or ill-will. Accordingly, Appellant's discretionary challenge fails.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/23/2014