

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MATTHEW DAVID GRANER

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 654 WDA 2014

Appeal from the Judgment of Sentence March 25, 2014
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0008531-2010

BEFORE: DONOHUE, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED DECEMBER 23, 2014

Appellant, Matthew David Graner, appeals from the March 25, 2014 aggregate judgment of sentence of four years' probation, imposed following the revocation of his prior probation sentence. After careful review, we affirm.

The trial court has summarized the relevant facts and procedural history as follows.

On December 7, 2010, Appellant[] pled guilty to two counts of Indecent Assault¹ and th[e] [trial] [c]ourt sentenced him to one year of probation for each count, to be served concurrently. Th[e] [trial] [c]ourt revoked Appellant's probation on May 15, 2012, based on his selling drugs while in a treatment facility, and resentenced him to consecutive one-

* Former Justice specially assigned to the Superior Court.

year periods of probation for each count. On March 25, 2014, th[e] [trial] [c]ourt again found Appellant to have violated his probation, this time for failing to complete his service plan. [That same day, t]he [trial] [c]ourt revoked his probation and resentenced him to consecutive periods of two years['] probation at each count.²

¹ 18 Pa.C.S.A. § 3126(a)(1).

² The sentence imposed was also consecutive to a two to five year sentence at CC#201114185, which were non-attributable charges of Child Pornography and Dissemination of Photo/Film of Sex Acts.

Trial Court Opinion, 6/17/14, at 2 (footnotes in original). Appellant's timely post-sentence motion, filed on April 2, 2014, was denied by the trial court on April 3, 2014. Thereafter, on April 24, 2014, Appellant timely filed a notice of appeal.¹

On appeal, Appellant raises the following issue for our review.

- I. In revoking and re-sentencing [Appellant] to consecutive periods of two-years['] probation at each count, thereby impos[ing] an aggregate sentence of four-years['] probation, whether [the trial court] abused [its] sentencing discretion when revocation was based solely on technical violations of probation, [Appellant] was revoked and re-sentenced in another case to 2-5 years['] state incarceration, and the recommendation of the [p]robation [o]ffice was to close interest in the case?

Appellant's Brief at 7.

¹ Appellant and the trial court have complied with Pa.R.A.P. 1925.

We review a trial court's sentence imposed following the revocation of probation for an error of law or an abuse of discretion. **Commonwealth v. Colon**, --- A.3d ---, 2014 WL 5408189, at *6 (Pa. Super. 2014). “[Our] scope of review in an appeal from a revocation of sentencing includes discretionary sentencing challenges.” **Commonwealth v. Cartrette**, 83 A.3d 1030, 1034 (Pa. Super. 2013) (*en banc*). “An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.” **Commonwealth v. Burns**, 988 A.2d 684, 689 (Pa. Super. 2009) (*en banc*) (citation omitted), *appeal denied*, 8 A.3d 341 (Pa. 2010).

Appellant does not dispute that he violated his probation. Instead, he claims that the trial court abused its discretion when it revoked his probation and sentenced him to two consecutive periods of two years' probation. Appellant's Brief at 19-23. This challenge to the discretionary aspects of a sentence is not appealable as of right. **Colon, supra** at *7.

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 [as required by Rule 2119(f) of the Pennsylvania Rules of Appellate Procedure]; 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 [Rule 2119(f)] concise statement of reasons, to grant consideration of his appeal on the grounds that there is a substantial question. [I]f the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case.

Commonwealth v. Edwards, 71 A.3d 323, 329-330 (Pa. Super. 2013) (citations omitted), *appeal denied*, 81 A.3d 75 (Pa. 2013).

Here, Appellant filed a timely notice of appeal, preserved one of his discretionary sentencing challenges,² and included a separate Rule 2119(f) concise statement in his appellate brief. Moreover, Appellant has raised a substantial question for our review in his Rule 2119(f) concise statement by

² Appellant's Rule 2119(f) statement contains two discretionary sentencing issues, which are that the trial court did not consider the relevant sentencing criteria pursuant to Section 9721(b) and that the trial court imposed an excessive sentence to a technical probation violation. Appellant's Brief at 17-18. A defendant must raise a challenge to the discretionary aspects of a sentence to the trial court during the sentencing proceeding or in a post-sentence motion. ***Cartrette, supra*** at 1042. Further, the challenge must be preserved in both a Rule 1925(b) statement and a Rule 2119(f) statement, otherwise, said challenge is waived. ***Id.*** We conclude that Appellant has not preserved his challenge based on Section 9721(b), as he did not include that challenge in his post-sentence motion or his 1925(b) statement. ***See*** Appellant's Post-Sentence Motion, 4/2/14, at 3-4 (unnumbered); Appellant's Concise Statement, 5/15/14, at 2-3 (unnumbered). Moreover, Appellant did not include this challenge in his Statement of the Question Involved in his Brief. Appellant's Brief at 7. Thus, that issue is waived. ***Cartrette, supra***. Even if we were to address the substance of the Section 9721(b) issue, we would conclude it was without merit for the reasons discussed herein.

asserting that the trial court's sentence was excessive as it was based solely on a technical violation. **See Commonwealth v. Malovich**, 903 A.2d 1247, 1253 (Pa. Super. 2006) (holding "a claim that a particular probation revocation sentence is excessive in light of its underlying technical violations can present a question that we should review"); **see also Commonwealth v. Mouzon**, 812 A.2d 617, 628 (Pa. 2002) (recognizing that an excessiveness challenge can present a substantial question even if the sentence is within the statutory limits).

Having determined that Appellant has met the threshold requirements, we review the merits of his appeal. "Revocation of a probation sentence is a matter committed to the sound discretion of the trial court[,] and that court's decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion." **Commonwealth v. Mazzetti**, 9 A.3d 228, 230 (Pa. Super. 2010) (citation omitted), *affirmed*, 44 A.3d 58 (Pa. 2012). Upon revocation of probation, a sentencing court has all of the sentencing options that existed at the time of the original sentence. 42 Pa.C.S.A. § 9771(b).

In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference.

Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa. Super. 2003).

“A trial court which has revoked probation may modify the original probationary period by lengthening it and by adding reasonable conditions.” ***Commonwealth v. McBride***, 433 A.2d 509, 510 (Pa. Super. 1981), *citing* ***Commonwealth v. Vivian***, 231 A.2d 301 (Pa. 1967), ***Commonwealth v. Johnson***, 378 A.2d 1013 (Pa. Super. 1977), and 42 Pa.C.S.A. § 9771(b).

In addition, in all cases where the court “resentsences an offender following revocation of probation ... 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.” Failure to comply with these provisions “shall be grounds for vacating the sentence or resentence and resentencing the defendant.”

Cartrette, supra at 1041, *quoting* 42 Pa.C.S.A. § 9721(b)). “A trial court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing court’s consideration of the facts of the crime and character of the offender.” ***Commonwealth v. Crump***, 995 A.2d 1280, 1283 (Pa. Super. 2010), *appeal denied*, 13 A.3d 475 (Pa. 2010).

Here, the record, as a whole, reflects that the aggregate sentence of four years of probation to run consecutively to Appellant’s imprisonment was not excessive. At the March 25, 2014 probation violation hearing, the trial court first heard testimony from Robert O’Brien, a representative from the probation department. O’Brien explained that Appellant committed a technical violation of his probation by failing to comply with the Justice Related Services’ (JRS) treatment and service plan. N.T., 3/25/14, at 3-4.

In a non-attributable case, the Honorable Donna Jo McDaniel revoked Appellant's probation of five years and sentenced him to a state prison term of two-and-a-half to five years. **Id.** at 5. As a result, O'Brien noted that Appellant's probation officer recommended allowing Appellant to be supervised by the Pennsylvania Board of Probation and Parole if he was released before the expiration of his maximum term on Judge McDaniel's sentence and closing interest in this case. **Id.** The sentencing court declined to adopt this recommendation stating, "the problem I have with that is that I already gave him a last chance warning [at his May 15, 2012 probation violation hearing,] and he just turned his head and ignored it. So that would be rewarding bad behavior." **Id.**

Counsel for Appellant joined in the recommendation of the probation officer. **Id.** at 6. Alternatively, Appellant's counsel suggested that the sentencing court impose probation upon Appellant's release from incarceration. **Id.** at 7. The trial court, noting that Judge McDaniel did not impose a probation sentence consecutive to the prison term he imposed, ordered consecutive probation in this matter for the following reasons.

My concern[] with [Appellant] is that, like many, he has a dual diagnosis. However, unlike most, when he relapses[,] he returns to sexually aggressive behavior with women.

So I am going to, once again, revoke his probations on the [two counts of indecent assault]. I am going to impose two years of probation at each of those, consecutive to each other, for four years of

probation; again, to comply with [D]OC treatment conditions.

So that's Count 1 and Count 3, indecent assault. And those two are imposed consecutive to each other, and also consecutive to Judge McDaniel's sentence [of two-and-a-half to five years' imprisonment].

Id. at 7-8.

The court then heard from Appellant,³ who accepted responsibility and acknowledged the need to address his substance abuse issues. **Id.** at 8-9.

The trial court concluded the sentencing hearing noting the following.

I do consider this sentence to be giving you a chance. I could easily have given you --

...

One to two [years of imprisonment] consecutive[,], or two to four [years of imprisonment], and that would be consecutive to Judge McDaniel's [sentence].

...

But I think it is in your best interest as well as the community's best interest, if they max you out on that sentence, and they well might, have a period of supervision to follow that will require you to do the things you have been required to do previously, and refused.

And if you again refuse to comply with the treatment recommendations that are designed to help you get your life on track, and also to protect

³ The court noted that it would reconsider Appellant's sentence if he made a statement. **Id.** at 8.

the community from the behaviors you exhibit when you are not in jail, then I will sentence you to a state sentence again.

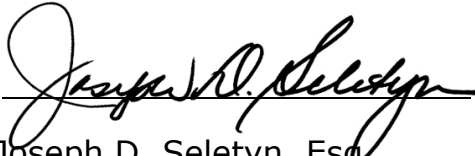
Id. at 9-10. The record reflects that the trial court, in fashioning Appellant's sentence, was concerned with the rehabilitative needs of Appellant and his substance abuse issues, as well as the protection of the community. At Appellant's first probation violation hearing in 2012, the court cautioned him that he would be "on a short leash" following that violation. N.T., 5/15/12, at 7. Despite this, Appellant violated the terms of his supervision by failing to remain drug-free and complete the JRS sex-offender treatment program. The trial court was clearly familiar with Appellant and his particular circumstances and considered the nature of the violation and character of Appellant. **See Crump, supra.** Therefore, a longer term of probation imposed consecutive to Appellant's term of confinement was not an excessive sentence because Appellant admitted his difficulty with substance abuse, and the trial court expressed concern that the activity would continue if Appellant is not supervised following his release from confinement. **See McBride, supra.**

Based on the foregoing, we conclude the sentencing court did not abuse its discretion by imposing an increased sentence of probation to run consecutively to Appellant's confinement upon revocation of Appellant's probation. **See Mazetti, supra.** Accordingly, the sentencing court's March 25, 2014 judgment of sentence is affirmed.

J-S67029-14

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: 12/23/2014