NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF M.R.D., JR., A MINOR	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: M.R.D., JR., A MINOR	No. 793 MDA 2013

Appeal from the Dispositional Order March 28, 2013
In the Court of Common Pleas of Luzerne County
Juvenile Division at No(s): CP-40-JV-0000017-2011
CP-40-JV-0000139-2010
CP-40-JV-0000148-2011
CP-40-JV-0000254-2011

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY OLSON, J.: **FILED MAY 27, 2014**

Appellant, M.R.D., Jr., appeals from an order of disposition entered on March 28, 2013 in the Juvenile Division of the Court of Common Pleas of Luzerne County. We dismiss this appeal as moot.

Four juvenile petitions are pertinent to the factual and procedural history of this appeal. At JV-139-2010, the Commonwealth charged Appellant with possession with intent to distribute and simple possession. On July 20, 2010, the juvenile court adjudicated Appellant delinquent on the charge of simple possession. That same day, the juvenile court entered a dispositional order sentencing Appellant to an indefinite term of probation. As part of its dispositional order, the court directed Appellant to comply with a curfew set by the juvenile probation office and to obey all federal, state, and local laws.

At JV-17-2011, the Commonwealth charged Appellant with firearms not to be carried without a license, possession of a firearm by a minor, and possession of a firearm with manufacturer number altered. On January 21, 2011, Appellant was adjudicated delinquent on the charge of possession of a firearm by a minor and the remaining charges were withdrawn. The juvenile court entered a dispositional order on March 28, 2011 ordering Appellant to serve an indefinite term of probation and directing him to comply with a curfew set by the juvenile probation office and to refrain from criminal activity.

At JV-148-2011, the Commonwealth charged Appellant with possession with intent to deliver, simple possession, and possession of drug paraphernalia. On July 6, 2011, the juvenile court adjudicated Appellant delinquent on the charge of possession of paraphernalia. The remaining charges were withdrawn. By order of disposition filed on July 22, 2011, the juvenile court again ordered Appellant to serve an indefinite period of probation, to comply with a curfew set by the juvenile probation office, and to refrain from unlawful activity.

At JV-254-2011, Appellant was charged with unauthorized use of a motor vehicle. Thereafter, on September 4, 2012, the juvenile court adjudicated Appellant delinquent for this offense. The disposition on this offense was deferred.

Before the juvenile court entered a dispositional order at JV-254-2011, the Commonwealth filed a motion seeking a declaration by the juvenile court

that Appellant violated his probation and asking the court to schedule a probation violation hearing. The Commonwealth attached a statement from Appellant's probation officer to its motion. According to the probation officer's statement, Appellant was arrested on August 14, 2012 and charged with robbery, various firearms related offenses, theft offenses, reckless endangerment, and simple assault. The statement also declared that, although Appellant's curfew had been set for 9:00 p.m., the foregoing offenses occurred on August 13, 2012 at 11:30 p.m.

After several continuances, the juvenile court convened a probation violation hearing on March 26, 2013. At the hearing, the attorney for the Commonwealth alleged that Appellant violated the terms of his probation by incurring new charges and staying out past his curfew. N.T., 3/26/13, at 3. The Commonwealth further alleged that Appellant had a full preliminary hearing on his homicide charges[1] and that his attorney waived a preliminary hearing on the robbery charges in exchange for a negotiated plea agreement. ***Id*.** Based upon these allegations, the Commonwealth argued that it had established a *prima facie* case to bind Appellant's new charges over to court. ***Id*.** The Commonwealth also called Appellant's probation officer to testify at the hearing. On direct examination by the Commonwealth, the officer confirmed that Appellant violated his 9:00 p.m.

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[1] These charges are not referred to in the Commonwealth's motion nor in its attached statement.

curfew and testified that the officer's source for this knowledge was a report reflecting the charges that were filed by the West Hazleton Police Department. ***Id.*** at 3-4. Counsel for Appellant objected on hearsay grounds to the testimony of Appellant's probation officer and thereafter declined to cross-examine the officer. No other witnesses were called to testify.

On March 28, 2013, the juvenile court issued an order finding that Appellant violated the terms and conditions of his probation. Probation Violation Order, 3/28/13, at 1. Based upon the violation, the court revoked and reinstated Appellant's probationary status.[2] ***Id.*** Appellant filed a notice of appeal on April 22, 2013. The juvenile court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). After receiving an extension, Appellant filed a concise statement alleging that the Commonwealth failed to prove by a preponderance of the evidence that he violated the terms of his probation. Appellant's Rule 1925(b) Statement, 7/12/13. Specifically, Appellant alleged that neither his arrest in August, 2012 for robberty, standing alone, nor his waiver of a preliminary hearing constituted sufficient evidence to revoke his probation. ***Id.***

On September 25, 2013, after Appellant filed his concise statement, but before the juvenile court prepared its Rule 1925(a) opinion, the

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[2] The juvenile court's order states that Appellant was then being housed at the Luzerne County Correctional Facility on adult charges.

Commonwealth filed a motion to terminate the court's supervision of Appellant. The Commonwealth's motion recalled that Appellant was originally placed on probation on July 20, 2010. Commonwealth's Motion to Terminate Supervision, 9/25/13, at 1. The motion further alleged that, on August 14, 2013, the Hazleton City Police Department arrested and charged Appellant with armed robbery and related offenses. ***Id.*** The motion also alleged that the Hazleton Police Department charged Appellant with criminal homicide and related offenses on August 18, 2013. ***Id.*** According to the Commonwealth's motion, Appellant entered a negotiated guilty plea to third-degree murder, robbery, and kidnapping on August 30, 2013. ***Id.*** The negotiated sentence was 25 to 50 years' incarceration in a state correctional facility. ***Id.*** Sentencing on these charges was scheduled for October 9, 2013. ***Id.*** On September 25, 2013, after considering the Commonwealth's motion, the juvenile court released Appellant from supervision and waived all outstanding costs, fines, restitution, and supervision fees. Juvenile Court Order, 9/25/13.

The juvenile court filed its Rule 1925(a) opinion on October 23, 2013. In its opinion, the juvenile court conceded that Appellant's robbery arrest, by itself, was insufficient to revoke Appellant's probation. Juvenile Court Opinion, 10/23/13, at 3. In addition, the court agreed that Appellant's waiver of his preliminary hearing on his robbery charge was insufficient to support a probation violation. ***Id.*** Nevertheless, the court explained that it revoked Appellant's probation based upon the testimony of the probation

officer which indicated that Appellant violated his curfew. ***Id*.** In addition, the court noted that Appellant incurred new homicide charges, that a full preliminary hearing was conducted, and that those charges were bound over to court. ***Id*.** at 3-4. Thus, the juvenile court concluded that "it did not revoke [Appellant's] probation based upon [Appellant's] new robbery arrest or his waiver of that preliminary hearing but as a result of [Appellant's violation of] his curfew and the full hearing on the homicide charges that were bound over for [c]ourt." ***Id*.** at 4.

On appeal, Appellant challenges the revocation of his probation, alleging that the evidence was insufficient to establish that he violated the terms of his supervision. We conclude, however, that in view of the juvenile court's September 25, 2013 order releasing Appellant from his supervision and waiving his financial responsibilities, the claims Appellant advances on appeal are moot.

Appellate courts will not decide moot questions. ***Delaware River Preservation Co., Inc. v. Miskin***, 923 A.2d 1177, 1183 n.3 (Pa. Super. 2007). "[T]he mootness doctrine requires an actual case or controversy to be extant at all stages of a proceeding, and an issue may become moot during the pendency of an appeal due to an intervening change in the facts of the case[.]" ***Pilchesky v. Lackawanna County***, 2014 WL 1236446, *7 (Pa. 2014). "An issue before a court is moot if in ruling upon the issue the court cannot enter an order that has any legal force or effect." ***Delaware River***, 923 A.2d at 1183 n.3.

Instantly, the juvenile court entered an order on September 25, 2013 that released Appellant from its supervision and waived his financial responsibilities incident to his probation. That change in the facts necessarily renders this appeal moot. Appellant's sole issue on appeal challenges the revocation of his probation on grounds that the Commonwealth failed to adduce sufficient evidence that he violated the terms of his supervision. By way of relief, Appellant asks this Court to reverse the juvenile court's finding that he violated his probation. Appellant's Brief at 7. In the aftermath of the juvenile court's September 25, 2013 order, however, Appellant's probation was effectively terminated. Thus, there is no order which this Court can enter that would have any legal force or effect in this case. Consequently, the present appeal is moot and we are constrained to dismiss.

Even if we were to conclude that Appellant's notice of appeal divested the juvenile court of jurisdiction and that, therefore, the court lacked authority to issue its September 25, 2013 order releasing Appellant from its supervision, ***see Commonwealth v. Brinson***, 30 A.3d 490 (Pa. Super. 2011) ("Within the closed judicial system of the Commonwealth, once a party takes an appeal to an appellate court, the trial court is divested of jurisdiction over the subject matter and may no longer proceed further in

the matter."), *appeal denied*, 42 A.3d 290 (Pa. 2012),[3] we would hold that Appellant is not entitled to relief. Appellant advances three contentions in support of his claim that the Commonwealth adduced insufficient evidence to establish a probation violation. First, Appellant claims that neither a mere arrest, nor a waiver of a preliminary hearing, can support a probation violation. ***See*** Appellant's Brief at 4, *citing* ***Commonwealth v. Sims***, 770 A.2d 346 (Pa. Super. 2001). Next, Appellant points out that the Commonwealth never referred to his pending homicide charges in its motion to declare him in violation of his probation. Appellant argues that this omission constitutes a violation of his right to due process and, therefore, that his homicide charges cannot support a probation violation. Appellant's Brief at 5. Lastly, Appellant argues that the testimony of the juvenile probation officer relating to Appellant's curfew violation constituted hearsay and was therefore insufficient to revoke his probation. In developing this claim, Appellant points out that the probation officer learned of the curfew violation through the arresting officer's report that Appellant's new offenses took place after 9:00 p.m. Citing ***Commonwealth v. Davis***, 586 A.2d 914 (Pa. 1991), Appellant argues that our Supreme Court has held that a court violates the due process clause of the Pennsylvania constitution when it

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[3] Rule 1701 of the Pennsylvania Rules of Appellate Procedure reaffirms the general principle that "after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter." Pa.R.A.P. 1701(a).

revokes a juvenile's probation based solely upon hearsay evidence. Appellant's Brief at 6.

The procedures for revoking probation and the rights afforded to a probationer during revocation proceedings are well settled:

> When a parolee or probationer is detained pending a revocation hearing, due process requires a determination at a pre-revocation hearing, a ***Gagnon I*** hearing, that probable cause exists to believe that a violation has been committed.[4] Where a finding of probable cause is made, a second, more comprehensive hearing, a ***Gagnon II*** hearing, is required before a final revocation decision can be made.
>
> The ***Gagnon II*** hearing entails two decisions: first, a consideration of whether the facts determined warrant revocation. The first step in a ***Gagnon II*** revocation decision ... involves a wholly retrospective factual question: whether the parolee [or probationer] has in fact acted in violation of one or more conditions of his parole [or probation]. It is this fact that must be demonstrated by evidence containing "probative value." Only if it is determined that the parolee [or probationer] did violate the conditions does the second question arise: should the parolee [or probationer] be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? Thus, the ***Gagnon II*** hearing is more complete than the ***Gagnon I*** hearing in affording the probationer additional due process safeguards, specifically: (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-

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[4] The terms ***Gagnon I*** and ***Gagnon II*** refer to the two-step probation revocation procedure first discussed by the United States Supreme Court in ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973). The certified record in this appeal contains no transcript or orders by the juvenile court that pertain to a ***Gagnon I*** hearing. Appellant, however, does not raise this issue on appeal and we shall address it no further.

> examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.
>
> Further, we note that there is a lesser burden of proof in a ***Gagnon II*** hearing than in a criminal trial because the focus of a violation hearing is whether the conduct of the probationer indicates that the probation has proven to be an effective vehicle to accomplish rehabilitation and a sufficient deterrent against future antisocial conduct. Thus, the Commonwealth need only prove a violation of probation by a preponderance of the evidence. Lastly, hearsay is not admissible at a ***Gagnon II*** hearing absent a finding of good cause for not allowing confrontation.

Commonwealth v. Allshouse, 969 A.2d 1236, 1240-1241 (Pa. Super. 2009) (internal citations and quotations omitted).

We conclude that the juvenile court properly considered the testimony of Appellant's probation officer and that the evidence of a curfew violation was sufficient to establish that Appellant violated the terms of his probation. As stated above, the Commonwealth attached the statement from Appellant's probation officer to its request that Appellant be found in violation of his probation. The statement indicated, among other things, that the probation officer had information showing that Appellant violated his curfew. As such, Appellant received notice of this particular alleged probation violation and was aware of how the Commonwealth intended to prove the violation at the upcoming hearing. After being placed under oath, the officer confirmed that Appellant violated his curfew. The officer also

testified that he obtained this information from a report prepared by the West Hazleton Police Department. Appellant's counsel had an opportunity to present evidence and question witnesses at the revocation hearing but declined the opportunity to cross-examine the probation officer. It is well-settled that out-of-court statements offered to explain the course of police conduct are admissible, and not hearsay, because they are offered not for the truth of the matters asserted but rather to show the information upon which police acted. ***See Commonwealth v. Arrington***, 86 A.3d 831, 849 (Pa. 2014) (trial court did not abuse its discretion in admitting document reflecting capital murder defendant's prior bad acts, as evidence was mentioned only briefly to explain why defendant's parole officer instituted parole revocation proceedings against him). Because the testimony and report concerning Appellant's curfew violation was offered to explain why revocation proceedings were instituted, the evidence was admissible non-hearsay and the juvenile court could properly consider the testimony of Appellant's probation officer in determining whether the Commonwealth established a violation by a preponderance of the evidence.[5] Accordingly,

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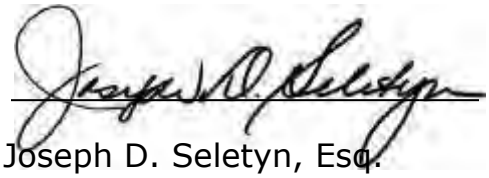
[5] Our Supreme Court's decision in ***Davis*** does not compel a different result. ***Davis*** was a plurality decision and, as such, has no precedential value that extends beyond the parties in that case. ***Commonwealth v. Brown***, 23 A.3d 544, 556 (Pa. Super. 2011) (opinion of the Supreme Court that does not command the joinder of a majority of the justices participating in the case does not, by itself, have precedential value); ***Interest of O.A.***, 717 A.2d 490, 496 n.4 (Pa. 1998) ("While the ultimate order of a plurality
(Footnote Continued Next Page)

Appellant would not be entitled to relief on his challenge to the sufficiency of the evidence offered to demonstrate his probation violation.

Appeal dismissed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/27/2014

(Footnote Continued) ——————————

opinion, *i.e.*, an affirmance or reversal, is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority.")