J. S71006/15

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JASON OMAR KEY,	:	No. 1749 WDA 2014
Appellant	:	

Appeal from the Judgment of Sentence, September 24, 2014,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0011088-2010

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND OTT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED FEBRUARY 02, 2016**

Jason Omar Key appeals from the judgment of sentence of September 24, 2014, following revocation of his probation. We affirm.

On February 2, 2011, appellant entered an open guilty plea to one count each of unlawful restraint, simple assault, and recklessly endangering another person ("REAP"). In exchange for appellant's plea, the remaining charges were withdrawn. The charges related to an incident on May 23, 2010, in which appellant struck his girlfriend in the face and held her and her godchildren, whom she was babysitting, against their will for approximately six hours. Armed with a large kitchen knife, appellant stayed up all night blocking the front door so they could not leave. The children ranged in age from 2-8 years old. Appellant's girlfriend sustained a cut to

her lip and a neck strain. (Notes of testimony, 2/2/11 at 7-8; criminal complaint, affidavit of probable cause, 5/24/10; docket #1.)

On February 10, 2011, the trial court imposed a sentence of 2 years' probation on count 1, unlawful restraint, and a determination of guilty without further penalty on count 6, simple assault, and count 7, REAP. Appellant was ordered to pay restitution of $1.00 with permission to amend within 30 days. Appellant was also ordered to stay away from the victim and to have a drug and alcohol evaluation with random urinalysis. (Notes of testimony, 2/10/11 at 6.) The trial court cautioned appellant, "Come back in here for criminal activity and/or any drug usage, we are going to have problems." (***Id.*** at 7.) On March 10, 2011, the order of restitution was amended to $1,443.80 to reflect the victim's medical expenses. (Docket #8.)

On July 3, 2013, appellant appeared for a violation of probation ("VOP") hearing for failure to pay restitution. Apparently, appellant had not made any payments. (Notes of testimony, 7/3/13 at 2.) Appellant admitted that he was working and had not made any payments towards restitution. (***Id.*** at 3.) The trial court imposed a new 2-year period of probation and ordered appellant to pay $50 per week. (***Id.*** at 3-4; docket #9.)

On August 13, 2014, appellant appeared for a second VOP hearing. According to his state parole officer, Todd Hryckowian, appellant missed two

individual behavioral therapy sessions.[1] (Notes of testimony, 8/13/14 at 3.) On March 18, 2014, Mr. Hryckowian visited appellant's home and found a baseball bat by the front door as well as a 6-inch hunting knife in the sofa cushions. (***Id.*** at 3.) On May 2, 2014, appellant tested positive for marijuana. (***Id.***) On June 6, 2014, appellant tested positive for marijuana a second time. (***Id.*** at 3-4.) On May 15, 2014, appellant had violated his curfew and was placed on GPS monitoring. (***Id.*** at 4.) On June 14 and 20, 2014, appellant left the Pittsburgh district and entered into the State of Ohio. (***Id.***) On June 20, 2014, appellant was arrested. (***Id.***) Appellant also admitted to leaving Pennsylvania two additional times. (***Id.***)

Appellant admitted leaving the Commonwealth but claimed it was to get a cash advance. (***Id.*** at 7-8.) According to appellant, he was a productive member of society, employed, and engaged to be married. (***Id.*** at 6.) Appellant's fiancée was at the VOP hearing and testified to appellant's good character. (***Id.*** at 9.) Mr. Hryckowian requested that appellant receive state time, noting that in just over three months, appellant had weapons in his home; he admitted to leaving the Commonwealth on four separate occasions; he had two positive urine screens for marijuana; and he missed two individual sex offender treatment sessions. (***Id.***) The trial court decided to give appellant "one more opportunity," stating,

[1] Appellant was a sex offender and was enrolled in treatment through Mercy Behavioral Health. (Notes of testimony, 8/13/14 at 2-3.) Appellant was subject to state supervision due to unrelated charges. (***Id.*** at 2.)

> Okay. Put him on GPS. Give him weekly urines. I want you to do your job. But I want you to understand you are so close to going to the state. You venture over the state line, you come up with a hot urine, you do anything -- you do anything that's a violation, you understand where you are going. You are not even coming back here again. Do you understand?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: Any violation, GPS violation, a urine violation, if he hits someone, if he does anything, don't bring him back. Do you understand? Just go with your recommendation. I don't want to see him again.
>
> [APPELLANT]: Your Honor --
>
> THE COURT: I don't want to hear anymore. Just move on with your life.

Id. at 10-11.

Appellant was back before the court on September 24, 2014. Mr. Hryckowian advised the court that appellant failed to show for an appointment on August 15, 2014. On August 20, 2014, appellant tested positive for THC (marijuana). (Notes of testimony, 9/24/14 at 3.) Appellant indicated to Mr. Hryckowian that he might have inadvertently smoked a cigarette laced with THC. (***Id.***) The trial court noted that appellant had written letters alleging that his probation officers tampered with his urine tests and requesting court-ordered blood, urine, and follicle drug tests. (***Id.*** at 5.) Appellant also claimed that he was lodged in county jail because of a

"vendetta." (***Id.***) However, at the VOP hearing appellant admitted to having smoked marijuana:

> [APPELLANT]: Yes, sir. I did some jostling in my brain and I did use marijuana and it was a poor decision on my behalf and I really need help with --
>
> THE COURT: I'll give you some help. Two to four years in the State Correctional Institution. They'll help you.

Id. at 6.

The trial court revoked appellant's probation and imposed a sentence of 2-4 years' incarceration at count 1, unlawful restraint. (Docket #10.) On October 3, 2014, appellant filed a post-sentence motion for modification of sentence, which was denied on October 8, 2014. A timely notice of appeal was filed on October 24, 2014. Appellant complied with Pa.R.A.P. 1925(b), and the trial court has filed an opinion.

Appellant has raised the following issue for this court's review:

> I. In revoking [appellant]'s probation and re-sentencing [him] to a sentence of total confinement of 2-4 years[']state incarceration, whether the trial court abused its sentencing discretion when it failed to place reasons on the record justifying its sentencing decision, revocation was based solely on technical violations of probation, and the requirements of 42 Pa.C.S.A. § 9721(b) were not met?

Appellant's brief at 5.

The sentence imposed 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.'" ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 792 (Pa.Super. 2001), quoting ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa.Super. 2000) (other citations omitted). ***See also Commonwealth v. Cartrette***, 83 A.3d 1030 (Pa.Super. 2013) (***en banc***) (this court's scope of review in an appeal from a revocation sentencing includes discretionary sentencing challenges). As the ***Coolbaugh*** court observed:

> We recently summarized our standard of review and the law applicable to revocation proceedings as follows:
>
> > Our 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. 42 Pa.C.S.A. § 9771(b) . . . . 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. Finally, it is the law of this Commonwealth that once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist:
> >
> > (1) the defendant has been convicted of another crime; or
> >
> > (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or,

> (3) such a sentence is essential to vindicate the authority of court.
>
> 42 Pa.C.S.A. § 9771(c).

Id., quoting ***Commonwealth v. Fish***, 752 A.2d 921, 923 (Pa.Super. 2000) (other citations omitted). We also note that the sentencing guidelines do not apply to sentences imposed as the result of probation revocations. ***Id.*** (citations omitted).

> An appellant wishing to appeal the discretionary aspects of a probation-revocation sentence has no absolute right to do so but, rather, must petition this Court for permission to do so. [***Commonwealth v. Malovich***, 903 A.2d 1247, 1250 (Pa.Super. 2006)]; 42 Pa.C.S.A. § 9781(b). Specifically, the appellant must present, as part of the appellate brief, a concise statement of the reasons relied upon for allowance of appeal. ***Malovich***, 903 A.2d at 1250; Pa.R.A.P. 2119(f). In that statement, the appellant must persuade us there exists a substantial question that the sentence is inappropriate under the sentencing code. ***Malovich***, 903 A.2d at 1250; Pa.R.A.P. 2119(f).

Commonwealth v. Kalichak, 943 A.2d 285, 289 (Pa.Super. 2008).

> In general, an appellant may demonstrate the existence of a substantial question by advancing a colorable argument that the sentencing court's actions were inconsistent with a specific provision of the sentencing code or violated a fundamental norm of the sentencing process. ***Malovich***, 903 A.2d at 1252. While this general guideline holds true, we conduct a case-specific analysis of each appeal to decide whether the particular issues presented actually form a substantial question. ***Id.*** Thus, we do not include or exclude any entire class of issues as being or not being substantial. ***Id.*** Instead, we

> evaluate each claim based on the particulars of its own case. ***Id.***

Id. at 289-290.

In appellant's Rule 2119(f) statement, he claims that the trial court failed to give specific reasons on the record to support a state sentence for technical violations. (Appellant's brief at 17-19.) Appellant complains that at the September 24, 2014 VOP hearing, the trial court abruptly cut him off and imposed a 2-4 year state sentence without consideration of all relevant sentencing factors. (***Id.***) "The imposition of a sentence of total confinement after the revocation of probation for a technical violation, and not a new criminal offense, implicates the 'fundamental norms which underlie the sentencing process.'" ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa.Super. 2010), ***appeal denied***, 13 A.3d 475 (Pa. 2010), quoting ***Sierra***, 752 A.2d at 913. "Additionally, a substantial question that the sentence was not appropriate under the Sentencing Code may occur even where a sentence is within the statutory limits." ***Id.***, citing ***Commonwealth v. Titus***, 816 A.2d 251 (Pa.Super. 2003). We determine appellant has raised a substantial question regarding the appropriateness of his sentence, and will proceed to review the merits of his claim.

Appellant claims that the trial court failed to state any reasons for the sentence imposed following technical violations of probation:

> Indeed, the trial court's entire "statement" of reasons constituted nothing more than a three-sentence, off-the-cuff, arbitrary decision after

> it suddenly interrupted [appellant] as he was trying to explain the extent of his drug addiction problem: "I'll give you some help. Two to four years in the State Correctional Institution. They'll help you."

Appellant's brief at 21-22, quoting notes of testimony, 9/24/14 at 6.

Appellant mischaracterizes the record by cherry-picking from the September 24, 2014 VOP hearing transcript. Just five weeks earlier, on August 13, 2014, the trial court had explicitly warned appellant that, "You venture over the state line, you come up with a hot urine, you do anything -- you do anything that's a violation, you understand where you are going." (Notes of testimony, 8/13/14 at 10.) On August 13, 2014, the trial court had exercised considerable leniency by declining to revoke appellant's probation and re-sentence him to state time despite Mr. Hryckowian's recommendation. Furthermore, this was appellant's third VOP hearing; on July 3, 2013, appellant's probation was revoked for failing to make any payments towards restitution despite being gainfully employed.[2] The trial court gave appellant several opportunities to comply with the conditions of his probation and he refused.[3]

The trial court also considered the fact that appellant lied to his probation officer and to the court when he initially denied smoking marijuana

[2] Indeed, in his post-sentence motion, appellant concedes that he still owes approximately $1,800 in restitution to his victim. (Docket #11.)

[3] We note that appellant's sentence of 2-4 years' incarceration for unlawful restraint, a first-degree misdemeanor, was well within the statutory limit of 5 years. 18 Pa.C.S.A. § 1104(1); 18 Pa.C.S.A. § 106(b)(6).

and claimed that he was being set up. Overall, the record is clear that the trial court revoked appellant's probation and imposed a sentence of total confinement in order to vindicate the authority of the court. "A sentencing 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." ***Crump***, 995 A.2d at 1283, citing ***Malovich***, ***supra***. In its Rule 1925(a) opinion, the trial court remarks,

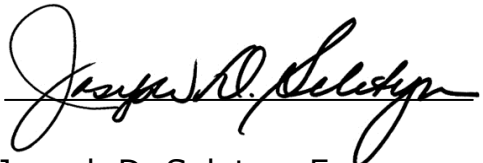
> [Appellant] has shown a disdain for authority. He knows he is not allowed to do drugs but he continues to do the same. The Court is appreciative of [appellant]'s comment of needing help with his addiction. However, the comment does not carry the requisite level of sincerity for the Court to act upon it. The Court viewed it as a last ditch effort to maintain his freedom. Notice, how there was never a request by [appellant] to his probation officer about his need for help. That circumstance is only advanced on judgment day. The Court believes [appellant] is in need of rehabilitative services. However, the success of those programs will have a better chance if [appellant] is drug free for a significant period of time.

Trial court opinion, 3/16/15 at 4.

We find the trial court did not abuse its discretion in revoking appellant's probation and imposing a sentence of 2-4 years' imprisonment. Therefore, we will affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/2/2016