NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAVID JOHN MILLER, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 124 EDA 2018

Appeal from the Judgment of Sentence Entered November 20, 2017
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0007027-2005

BEFORE: BENDER, P.J.E., KUNSELMAN, J., and STEVENS, P.J.E.*

MEMORANDUM BY BENDER, P.J.E.: **FILED MAY 1, 2019**

Appellant, David John Miller, Jr., appeals from the judgment of sentence of 1-2 years' imprisonment following the revocation of his probation. We affirm.

The revocation court summarized the factual background and procedural history of this case as follows:

> [Appellant] filed a notice of appeal from the judgment of sentence this court entered [on] November 20, 2017. This court entered that judgment of sentence after this court revoked [Appellant's] special probation upon the finding that he had violated a condition of his probation and that probation had been proven to be an ineffective vehicle to accomplish rehabilitation and insufficient to deter against future antisocial conduct.

I. BACKGROUND AND PROCEDURAL HISTORY

---

* Former Justice specially assigned to the Superior Court.

> On May 26, 2006, [Appellant] pled guilty to four counts of sexual abuse of children—possession of child pornography.[1] On September 19, 2006, the Honorable Richard J. Hodgson sentenced [Appellant] to an aggregate sentence of four to eight years[' imprisonment] plus three years[′] consecutive special probation. Judge Hodgson specified as a special condition of sentence that "[Appellant] shall comply with any special conditions of probation/parole imposed by the PA Board of Probation and Parole."[1] On May 12, 2015, [Appellant] was released on probation after acknowledging and agreeing to conditions set out in a preprinted form entitled "Standard Special Conditions for Sex Offenders" and a preprinted form entitled "Optional Special Conditions for Sex Offenders."
>
> [1] 18 Pa.C.S. § 6312.
>
> On August 22, 2017, the … Board … applied to this court for revocation proceedings. [Appellant] was charged with violating his probation by viewing sexually explicit material and by being in an area where persons under 18 commonly congregate. Judge Hodgson was no longer available and the matter was rotated to the undersigned who presided at a combined ***Gagnon I*/*Gagnon II***[2] hearing on November 20, 2017.
>
> At that hearing, the Commonwealth proffered evidence to prove that [Appellant] had on August 1, 2017[,] gone to the Andorra Library and seated himself at a public-access computer right next to the children's section of the library [and viewed] photos of young boys in their underpants. The Commonwealth introduced the conditions that [Appellant] acknowledged and agreed to as Exhibit C-2 and Exhibit C-3. The Commonwealth presented the testimony of [Appellant's] probation supervisor and the librarian who stood behind [Appellant] and took a photograph of him[,] which showed him viewing an image of a boy in his underpants. The librarian's photo also showed that [Appellant] was seated right next to the children's section of the library with a view of it. The librarian's photo was admitted as Exhibit C-5.
>
> [Appellant] cross-examined the Commonwealth's witnesses but [Appellant] did not testify and did not proffer a witness on his

---

[1] Hereinafter, we will refer to the Pennsylvania Board of Probation and Parole as "the Board."

[2] ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973).

> behalf. The undersigned heard oral argument presented by counsel for the parties and agreed with [Appellant] that a photo of a boy in his underpants is not sexually explicit. However, the undersigned agreed with the Commonwealth that [Appellant] was in an area where persons under 18 commonly congregate. It was clear that [Appellant's] special probation had been an ineffective vehicle to accomplish rehabilitation and [was] insufficient to deter against his future antisocial conduct. Accordingly, on November 20, 2017, this court revoked the sentence that Judge Hodgson had imposed on September 19, 2006[,] and sentenced [Appellant] to a term of one to two years['] state incarceration, a consecutive term of one year[] probation, and to pay the balance of fines, cost and restitution. [Appellant] was also ordered to comply with any special conditions of the … Board …, to be supervised by the Sex Offender Unit, and to complete sex offender treatment.
>
> On November 30, 2017, [Appellant] filed a post-sentence motion asking this court to vacate or modify [his] sentence. This court directed the Commonwealth to file its response while directing both parties to file briefs. Oral argument was heard by the undersigned on December 18, 2017[,] and that oral argument was taken down by the court reporter. On December 20, 2017, this court entered an order denying [Appellant's] post-sentence motion. [Appellant] filed a notice of appeal on December 20, 2017[,] and a concise statement of errors complained of on appeal on January 5, 2018. On March 1, 2018, the undersigned filed an opinion addressing the assignments of error [Appellant] had set out in his concise statement filed [on] December 20, 2017.
>
> On April 24, 2018, the Superior Court entered an order that, among other things, granted [Appellant] leave to file a supplemental concise statement and instructed this court to file a supplemental opinion. [Appellant] filed this supplemental statement on May 15, 2018….

Revocation Court Opinion (RCO), 6/7/2018, at 1-3 (internal citation and footnote omitted).

> Presently, Appellant raises the following issues for our review:
>
> I. Does evidence that [Appellant] sat in the computer section of a public library suffice to show that he was in an area "where the primary activity … involve [*sic*] persons under the age of 18 years"?

> II. Did the Board … lack authority to impose a condition of probation preventing [Appellant] from attending a library where the sentencing court did not impose related conditions of probation?

Appellant's Brief at 4 (bold formatting omitted).

At the outset, we acknowledge that "in an appeal from a sentence imposed after the court has revoked probation, we can review the validity of the revocation proceedings, the legality of the sentence imposed following revocation, and any challenge to the discretionary aspects of the sentence imposed." ***Commonwealth v. Wright***, 116 A.3d 133, 136 (Pa. Super. 2015) (citation omitted). Further,

> [r]evocation 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. When assessing whether to revoke probation, the trial court must balance the interests of society in preventing future criminal conduct by the defendant against the possibility of rehabilitating the defendant outside of prison. In order to uphold a revocation of probation, the Commonwealth must show by a preponderance of the evidence that a defendant violated his probation. [T]he reason for revocation of probation need not necessarily be the commission of or conviction for subsequent criminal conduct. Rather, this Court has repeatedly acknowledged the very broad standard that sentencing courts must use in determining whether probation has been violated[.] A probation violation is established whenever it is shown that the conduct of the probationer indicates the probation has proven to have been an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct.

Commonwealth v. Colon, 102 A.3d 1033, 1041 (Pa. Super. 2014) (internal citations and quotation marks omitted; some brackets added).

In Appellant's first issue, he challenges the sufficiency of the evidence to prove he violated a condition of his probation. Namely, he asserts that

"[e]vidence that [he] used the computer section of a public library was insufficient to demonstrate that he attended a location 'where the primary activity … involve [*sic*] persons under the age of 18 years.'" Appellant's Brief at 12 (bold formatting omitted).

Here, the revocation court rejected Appellant's sufficiency argument, explaining:[3]

> The text of the controlling condition was as follows:
>
> > You must not loiter, attend, visit, or participate in events where the primary activity at such locations involve persons under the age of 18 years without the prior written approval of probation/parole supervision staff and if applicable, in agreement with your treatment provider. These areas include but are not limited to the following places: playgrounds, youth recreation centers, youth clubs, arcades, amusement parks, child daycare centers, elementary schools, high school, elementary/high school bus stops, Special Olympic events, Boy Scout/Girl Scout meetings or events, county or community fairs and carnivals, or any similar areas where persons under the age of 18 years old commonly congregate.

---

[3] The revocation court encourages us to deem this issue waived because it believes Appellant did not state with specificity the element(s) upon which the evidence was insufficient in his Rule 1925(b) statement. RCO at 5 (citing, *inter alia*, ***Commonwealth v. Garland***, 63 A.3d 339, 344 (Pa. Super. 2013)). Specifically, Appellant presented this issue in his Rule 1925(b) statement as follows: "The trial court erred in finding Appellant in violation of his probation condition 3-A because the evidence was insufficient as a matter of law to support the finding." Supplemental Rule 1925(b) Statement, 5/15/2018, at ¶ 1. Despite urging us to find waiver, the revocation court correctly discerned and addressed Appellant's issue in an alternative analysis in its Rule 1925(a) opinion. ***See*** RCO at 5-7. Therefore, we decline to find waiver. ***See Commonwealth v. Laboy***, 936 A.2d 1058 (Pa. 2007) (determining that the appellant did not waive his sufficiency issues due to a vague Rule 1925(b) statement where his case was relatively straightforward and the trial court readily apprehended his claims).

N.T.[Hearing], 11/20/[20]17, Exhibit C-3 (Optional Special Conditions for Sex Offenders, ¶ 3).

The Commonwealth thus sought to prove by preponderance that the Andorra Library was a "similar area where persons under the age of 18 years old commonly congregate." The Commonwealth proved that the Andorra Library attracts persons under 18 in four ways: (1) by offering a regularly scheduled arts and crafts program for children; (2) by offering a regularly scheduled homework assistance program for children; (3) by having a special children's section of the library; and (4) by serving as a safe place for children to spend time while waiting to be retrieved by their parents. [***Id.*** at] 29-31. Sometimes children come to the library with their family, sometimes as a school class, and "[a] lot" of children come to the library alone for the after-school programs. [***Id.*** at] 29. There are children in the library every day. [***Id.*** at] 30. Children are not usually at the library during school hours, but when there is no school, children can be expected to be at the library "throughout the day." [***Id.***] Upon that uncontroverted evidence, the undersigned concluded that the Andorra Library was a "similar area where persons under the age of 18 years old commonly congregate."

Second, even if [Appellant's] presence in the library was not by itself a violation, this court reasoned that the specific place where [Appellant] seated himself was a violation. [Appellant] was using a public-access computer "right next to" the children's section with a full view of the children's section. [***Id.*** at] 31; Exhibit C-5.[3] And more than that, [Appellant] was spotted sitting right next to the children's section while children were lingering – a children's program conducted in the children's section was "wrapping up" at the time. N.T.[Hearing at] 30, 32. Upon that uncontroverted evidence, the undersigned concluded that the specific place where [Appellant] seated himself in the Andorra Library on August 1, 2017 was a "similar area where persons under the age of 18 years old commonly congregate" and a violation of his probation.[4] [Appellant's] sufficiency of the evidence argument lacks merit.

[3] Counsel for [Appellant] conceded that [Appellant] was seated "adjacent" to the children's section. N.T.[Argument], 12/18/[20]17, [at] 9-10.

[4] [Appellant's] conduct on August 1, 2017[,] was a violation of his probation[,] but it should be noted that the librarian

> testified that [Appellant] "comes into the library a lot to use the computer." N.T.[Hearing at] 20.

RCO at 5-7.

In response, Appellant argues that "he was in a library, but he was not in a place where the primary activity involved persons under the age of 18 years. Indeed, all evidence confirms that [Appellant] was specifically outside of the areas designated for persons under the age of 18 years." Appellant's Brief at 12. Moreover, he points to evidence adduced at the hearing that the regularly scheduled arts and crafts programs took place in a separate area downstairs, no homework assistance program was taking place at the time because it was summer vacation, and the children's program for that particular day had concluded. ***Id.*** at 13-14. Further, he says that he was "seated in the computer section while using a computer, as were other adult patrons around him. This was not a designated children's area." ***Id.*** at 14 (citation omitted).

No relief is due. As the revocation court discerned, the specific place where Appellant seated himself in the library was a violation, notwithstanding that he did not physically enter the designated children's area. The librarian, Kimberly Pritchett, testified at the hearing to the following:

> [The Commonwealth:] And on this specific date on August 1, 2017, the children that were in the library on that date, were they in a specific section --
>
> [Ms. Pritchett:] A lot of them were over in the children's area because the after school program was wrapping up, but there was one child on the computer behind [Appellant]. But the rest of the children, they were either just running around or they were just in the children's area.

> [The Commonwealth:] When you say running around, do the children run around the computer area at all?
>
> [Ms. Pritchett:] Yes.
>
> [The Commonwealth:] And where is the children's section in relation to the computer area?
>
> [Ms. Pritchett:] The children's section -- well, if you can see like in the picture right here, that area in front of the -- where [Appellant] is sitting, that's the children's area.
>
> [The Commonwealth:] Okay. So, it's right next to it?
>
> [Ms. Pritchett:] Yes.

N.T. Hearing at 30-31.

Notwithstanding that Appellant was not in the designated children's area, he was using a computer facing the children's section, and children were in fact present. We agree with the revocation court that the children's section of the library constitutes "a similar area where persons under the age of 18 years old commonly congregate." RCO at 6-7. Thus, the evidence was sufficient to prove his violation.

In Appellant's second issue, he avers that "[t]he Board … did not have authority to impose a condition of probation that prevents sex offenders from using public libraries where the trial court did not impose specific conditions of probation." Appellant's Brief at 15 (bold formatting omitted). He argues that "the condition itself was invalid because the trial court's delegation of authority to the … Board … was overbroad and in contravention of the Sentencing Code, which establishes that the trial court, and not the Board …, imposes conditions of probation." ***Id.*** at 10. According to Appellant, "the sentencing court instructed that '[Appellant] shall comply with any special

conditions of probation/parole imposed by … the PA Board of Probation and Parole[.]'" ***Id.*** at 16 (citation omitted). Therefore, he insists that "the trial court's delegation to the Board … lacked any specificity from which the subsequent supervisory conditions by the Board … could derive." ***Id.*** Further, he says "the [c]ondition at issue as applied is unduly restrictive in violation of the Sentencing Code and the Constitution." ***Id.*** at 10.

The revocation court determined that Appellant waived this claim. It noted that, through this argument, Appellant is challenging Judge Hodgson's delegation of authority to the Board in the original sentence imposed on September 19, 2006. ***See*** RCO at 11. The revocation court discerned that Appellant acknowledged and agreed to the conditions on May 12, 2015. ***Id.*** at 12; ***see also*** Commonwealth's Brief at 13 (arguing that Appellant waived this issue because, *inter alia*, in 2015, Appellant "explicitly agreed to the condition. He signed a form indicating that he understood the conditions of his probation, including this one (which he also initialed), agreed to abide by them, and understood the consequences for a violation") (citation omitted). The revocation court also observed that Appellant "signed and acknowledged the Board's Notice of Charges on October 11, 2017. And [Appellant] was represented by counsel at the revocation proceedings on November 20, 2017[,] during which there was a full evidentiary hearing on the substance of the charges, a sentencing hearing, and the entry of judgment of sentence." RCO at 12. Yet, the revocation court pointed out that "it was not until November 30, 2017 that [Appellant] first raised this challenge by filing a post-

sentence motion[,]" and that Appellant's counsel later divulged at oral argument on the post-sentence motion that "the challenge to the validity of the condition was intentionally withheld upon the belief that defending on the merits was the better strategy…." ***Id.*** Thus, it deemed this challenge waived.

With respect to the revocation court's finding of waiver, Appellant argues that he has preserved this claim for the following reasons:

> [Appellant's] challenge to [the at-issue condition] as applied was raised at the earliest opportunity in the post-sentence motion and supporting papers. Although the revocation court's supplemental opinion argues that this issue was waived, trial counsel was precluded from challenging the condition of parole[/probation] as applied during the 2006 sentencing proceedings. This is because the condition at issue was not established until 2015, when [Appellant] was released on parole; the [Board] sent Judge Hodgson notice of special conditions on May 8, 2015. Counsel for [Appellant] would have thus first encountered the condition during the course of the revocation hearing. Even if counsel had encountered the condition as written prior to the revocation hearing, the vague and overbroad wording of the condition would not have put counsel on notice of the Board['s] intention to enforce [the condition] in the context of public libraries.
>
> Counsel challenged the application of the condition to libraries through cross-examination and argument at the ***Gagnon*** hearings and challenged the authority of the Board … to impose the condition in a timely post-sentence motion. The revocation court had a full opportunity to weigh-in on the issue, which was briefed and argued.

Appellant's Brief at 9 n.1 (citations omitted).

We disagree with Appellant that he raised this issue 'at the earliest opportunity,' as his counsel's representations at the oral argument on the post-sentence motion belie this argument. There, the following exchange took place:

> [Appellant's counsel:] Your Honor, it's our position that the finding that [Appellant is] in violation is not in accord with Section 9554,[4] nor is it in accord with existing case law, which requires that conditions of probation be imposed directly by the trial court or they be germane to or within the parameters of those probation conditions imposed by the trial court.
>
> [The court:] Can I interrupt you a second?
>
> [Appellant's counsel:] Sure.
>
> [The court:] Did you raise this issue before me before I did the sentence or even after I sentenced [Appellant]? Did you ever say once in the record that the condition imposed by the Probation Department or Parole was an illegal condition that the [c]ourt could not consider a violation of?
>
> [Appellant's counsel:] I did not, Your Honor. We had multiple arguments with regard to this case, one of which was that we didn't feel that my client had violated any of the conditions on its face, ***so we chose to do that argument first***. And when filing the post-sentence motion, we raised this one.
>
> [The court:] All right. So you argued the facts of the case as presented in the case, but never argued the law with regard to what conditions of probation or parole can be imposed by the … Board … as an office supervising a particular defendant?
>
> [Appellant's counsel:] That is correct, Your Honor.

N.T. Argument at 2-3 (emphasis added); ***see also*** RCO at 12 (stating that Appellant's "challenge to the validity of the condition was intentionally withheld upon the belief that defending on the merits was the better strategy…"). We further note that, after the presentation of witnesses at the revocation hearing, the revocation court permitted argument by counsel, and Appellant's attorney never argued — let alone mentioned — that the Board did not have the authority to impose the at-issue condition. ***See*** N.T. Hearing

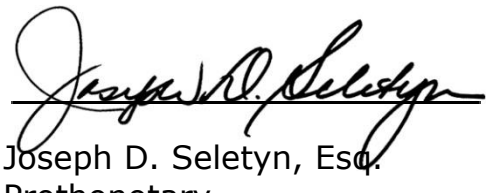
---

[4] We believe Appellant's counsel meant to refer to 42 Pa.C.S. § 9754, which relates to orders of probation.

at 34-40, 45-46. Thus, we agree that Appellant has waived this claim. ***Commonwealth v. King***, 430 A.2d 990, 991 (Pa. Super. 1981) ("[O]bjections not raised during a counselled revocation proceeding will not be considered on appeal.") (citations omitted). Similarly, with respect to Appellant's argument that the at-issue condition is unduly restrictive, Appellant has waived this claim by not raising it until he filed his concise statement. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Accordingly, we affirm the revocation court's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/1/19