

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
KURT HOLLOWAY	:	
	:	
Appellant	:	No. 1579 EDA 2018

Appeal from the Judgment of Sentence April 27, 2018
 In the Court of Common Pleas of Bucks County Criminal Division at
 No(s): CP-09-CR-0001877-2017

BEFORE: LAZARUS, J., OLSON, J., and STRASSBURGER*, J.

MEMORANDUM BY OLSON, J.: **FILED FEBRUARY 08, 2019**

Appellant, Kurt Holloway, appeals from the judgment of sentence entered on April 27, 2018. We affirm.

The trial court ably summarized the facts and procedural posture of this appeal:

On July 13, 2017, Appellant [pleaded] guilty to one count of retail theft. . . . [The trial court sentenced him to serve a term of three years of probation.]. As [a] special condition[] of his probation he was ordered, [among other things, to] continue residence at Last Stop Recovery House. . . .

Shortly after being [placed on probation,] Appellant left the court-ordered recovery house without permission or notice. He incurred a new arrest in Bucks County on September 1, 2017, and a second arrest in Montgomery County on September 13, 2017. Appellant’s arrest in Bucks County was for a retail theft of powder infant formula from a Wegman’s Store. His arrest in Montgomery County was for possession of a controlled substance and drug paraphernalia. He was taken into custody and detained at the Bucks County

* Retired Senior Judge assigned to the Superior Court.

Correctional Facility [("BCCF")] after the Montgomery County arrest.

While in BCCF, Appellant incurred six misconducts. . . .

Trial Court Opinion, 7/24/18, at 1-3 (internal footnotes and some internal capitalization omitted).

On April 27, 2018, the trial court held a violation of probation hearing. The trial court found Appellant in violation of his probation and the trial court then resentenced Appellant to serve a term of one to three years in prison for the underlying retail theft conviction.¹ N.T. Revocation and Resentencing Hearing, 4/27/18, at 28-31.

Appellant filed a timely notice of appeal. He raises one claim to this Court:

Did the trial court abuse its discretion by imposing a sentence that was excessive in that it exceeds what is necessary to protect the public and rehabilitate Appellant?

Appellant's Brief at 5 (some internal capitalization omitted).

Appellant's claim challenges the discretionary aspects of his sentence. **See Commonwealth v. Lee**, 876 A.2d 408 (Pa. Super. 2005) (claim that the trial court erred in imposing an excessive sentence is a challenge to the discretionary aspects of a sentence). We note that, in an appeal following the revocation of probation, our scope of review includes discretionary aspects of sentencing claims. **Commonwealth v. Cartrette**, 83 A.3d 1030, 1042 (Pa. Super. 2013) (*en banc*). With respect to our standard of review, we have held

¹ 18 Pa.C.S.A. § 3929(a)(1).

that “sentencing is a matter vested in the sound discretion of the sentencing judge, whose judgment will not be disturbed absent an abuse of discretion.” ***Commonwealth v. Ritchey***, 779 A.2d 1183, 1185 (Pa. Super. 2001). Moreover, pursuant to statute, Appellant does not have an automatic right to appeal the discretionary aspects of his sentence. **See** 42 Pa.C.S.A. § 9781(b). Instead, Appellant must petition this Court for permission to appeal the discretionary aspects of his sentence. ***Id.***

As this Court has explained:

[t]o reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. [708(E)]; (3) whether appellant’s brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b).

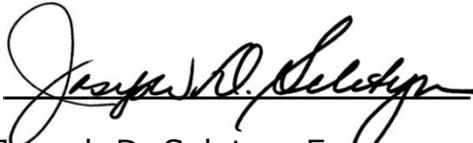
Commonwealth v. Cook, 941 A.2d 7, 11 (Pa. Super. 2007); **see also** ***Cartrette***, 83 A.3d at 1042 (“issues challenging the discretionary aspects of a sentence [following the revocation of probation] must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived”); ***Commonwealth v. Kalichak***, 943 A.2d 285, 289 (Pa. Super. 2008) (“when a court revokes probation and imposes a new sentence, a criminal defendant needs to preserve challenges to the

discretionary aspects of that new sentence either by objecting during the revocation sentencing or by filing a [motion to modify] sentence”).

Appellant did not challenge the discretionary aspects of his sentence at the resentencing hearing and Appellant did not file a motion to modify his sentence. **See** N.T. Revocation and Resentencing Hearing, 4/27/18, at 1-32; Pa.R.Crim.P. 708(E). Therefore, Appellant waived his discretionary aspects of sentencing claim. **Cartrette**, 83 A.3d at 1042.

Judgment of sentence affirmed. Jurisdiction relinquished.

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: 2/8/19