

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JOSEPH FITZGERALD	:	
	:	
Appellant	:	No. 468 EDA 2021

Appeal from the Judgment of Sentence Entered January 28, 2021,
in the Court of Common Pleas of Philadelphia County,
Criminal Division at No(s): CP-51-CR-0013493-2013.

BEFORE: KUNSELMAN, J., McLAUGHLIN, J., and KING, J.

MEMORANDUM BY KUNSELMAN, J.:

FILED APRIL 5, 2022

Joseph Fitzgerald appeals from the judgment of sentence of two to four years of incarceration followed by one year of probation imposed for violation of probation (VOP). Fitzgerald challenges the discretionary aspects of his sentence. We affirm.

In his underlying offenses, Fitzgerald stabbed a retired police officer. On February 18, 2014, he entered a negotiated guilty plea to aggravated assault and possessing instruments of crime.¹ He was sentenced to an aggregate term of 11½ to 23 months of incarceration with immediate parole and 6 years of reporting probation.²

¹ 18 Pa.C.S.A. §§ 2702(a) and 907(a).

² Contrary to Fitzgerald’s brief and the VOP court’s opinion, the duration of the concurrent period of probation was 6 years, not 5 years. Order of Sentence, 2/18/14, at 1 (unpaginated).

Fitzgerald had completed his parole period and served three and a half years of probation, when he stopped reporting to his probation officer on September 6, 2017. A warrant was issued for his arrest on November 21, 2017. Fitzgerald remained in wanted status until October 20, 2020, when he was arrested for possessing a firearm. On January 1, 2021, the firearm offense was dismissed at a preliminary hearing for lack of evidence. Fitzgerald remained detained pending the VOP hearing.

Fitzgerald's VOP hearing was held on January 28, 2021.³ Fitzgerald's probation officer testified that Fitzgerald had failed to respond to phone calls, letters, and home visits. N.T., 1/28/21, at 6. He added that Bucks County had issued a warrant for Fitzgerald's arrest for a summary disorderly conduct charge when Fitzgerald absconded. **Id.** Fitzgerald's attorney explained the employment and family circumstances that led to Fitzgerald's failure to report. **Id.** at 9. She mentioned that Fitzgerald and his grandmother had health issues putting them at risk during the pandemic. **Id.** at 10. Fitzgerald apologized and promised not to abscond again. **Id.** at 11. The VOP court revoked probation, explaining: "Well, Mr. Fitzgerald, you absconded for three years on probation -- three and a half years. And I think that you were aware that you had to report and see somebody." **Id.** The court sentenced him to two to four years of incarceration followed by one year of reporting probation.

³ Fitzgerald cited the notes of testimony from this proceeding in his brief, but the transcript was not included in the certified record. We made an informal inquiry and thereby obtained the transcript. **Commonwealth v. Preston**, 904 A.2d 1, 8 (Pa. Super. 2006) (*en banc*).

On February 5, 2021, Fitzgerald moved to reconsider. The VOP court heard the matter on February 26, 2021. Fitzgerald's attorney emphasized that Fitzgerald had been compliant until 2017. N.T. 2/26/21, at 8–9. She read into the record letters from Fitzgerald's mother and grandmother describing his care for them and their need for him. *Id.* at 11–15. She explained that Fitzgerald supports his children and had lined up employment. *Id.* at 15–16. Fitzgerald again apologized and promised not to abscond again. *Id.* at 18. The VOP court denied reconsideration, stating: "Given the fact that Mr. Fitzgerald absconded for over three years, he [would] not be before us now unless he had been picked up on a warrant." *Id.* at 22.

Fitzgerald filed a timely notice of appeal. Fitzgerald and the VOP court complied with Pennsylvania Rule of Appellate Procedure 1925.

Fitzgerald presents the following question for our review:

Did the sentencing court abuse its discretion and violate both 42 Pa.C.S.[A.] § 9721(b) and the fundamental norms underlying the sentencing process by failing to give individualized consideration to [Fitzgerald's] background, personal history, or rehabilitative needs when imposing a manifestly unreasonable and excessive sentence of two (2) to four (4) years of incarceration for a first violation of probation, and by failing to adequately explain the reasons for the sentence imposed?

Fitzgerald's Brief at 4.

Fitzgerald challenges the discretionary aspects of his sentence. ***Commonwealth v. Cartrette***, 83 A.3d 1030, 1041 (Pa. Super. 2013) (*en banc*). Before addressing the merits of this issue, we must determine whether he has properly invoked this Court's jurisdiction:

We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (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.A. § 9781(b).

Commonwealth v. Renninger, ___ A.3d ___, 2022 PA Super 2, at 12 (Jan. 3, 2022) (*en banc*) (quoting **Commonwealth v. Beatty**, 227 A.3d 1277, 1286–87 (Pa. Super. 2020)).

Here, Fitzgerald met the first three requirements by filing a timely notice of appeal, preserving his claim in a post-sentence motion, and including a Rule 2119(f) statement in his brief. Fitzgerald's Brief at 14–17. Fitzgerald's claim raises a substantial question. **Commonwealth v. Derry**, 150 A.3d 987, 992–95, 999 (Pa. Super. 2016) (holding that a VOP court's failure to consider the Section 9721(b) factors presents a substantial question); **Commonwealth v. Schutzues**, 54 A.3d 86, 98 (Pa. Super. 2012) ("An argument that the trial court imposed an excessive sentence to technical probation violations raises a substantial question."); **Commonwealth v. Parlante**, 823 A.2d 927, 929–30 (Pa. Super. 2003) (finding a substantial question based on claims that the VOP court did not consider the appellant's background or provide adequate reasons for a grossly disproportionate sentence). We thus address the merits.

Fitzgerald's argument is multifaceted. He argues that the VOP court erred in focusing only on his absconding and new arrest and ignoring his family and personal history, his rehabilitative needs, and the circumstances of the

underlying aggravated assault. Fitzgerald's Brief at 18. He indicates that the court was unfamiliar with his case at the initial VOP hearing. *Id.* at 21–22. He claims that the court disregarded Section 9721(b) "by failing to impose the minimum confinement consistent with the protection of the public, the gravity of the offense, and Mr. Fitzgerald's rehabilitative needs." *Id.* at 18–19. He complains that the court did not adequately state its reasons on the record. *Id.* at 19. Therefore, he asks us to vacate the sentence and remand. *Id.*

The Commonwealth argues that the VOP court properly considered all required factors and explained its reasoning on the record. Commonwealth's Brief at 12–15. The Commonwealth urges that the sentence imposed was reasonable based on Fitzgerald's absconding for over three years and his potential maximum sentence. *Id.* at 15–16. It indicates that Fitzgerald's summary disorderly conduct conviction was a direct violation for which the VOP court could have sentenced him pursuant to 42 Pa.C.S.A. § 9771(c)(1). The Commonwealth concludes that the VOP court acted within its discretion in sentencing Fitzgerald pursuant to 42 Pa.C.S.A. § 9771(c)(3).⁴

Our standard of review for this claim is deferential; we will reverse only for an abuse of discretion by the VOP court. ***Commonwealth v. Pasture,***

⁴ Fitzgerald filed a reply brief challenging certain ***Gagnon I*** and ***II*** reports cited by the Commonwealth as being outside the record. Because the VOP court did not have these reports available, Fitzgerald argues this Court should not consider them. As the reports are not necessary to our disposition of this case, we do not need to address this contention.

107 A.3d 21, 27 (Pa. 2014) (citing **Commonwealth v. Perry**, 32 A.3d 232 (Pa. 2011), and **Commonwealth v. Walls**, 926 A.2d 957 (Pa. 2007)).

The reason for this broad discretion and deferential standard of appellate review is that the sentencing court is in the best position to measure various factors and “determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.” **Perry**, [] 32 A.3d at 236 (quoting **Walls**, [] 926 A.2d at 961 (citations omitted)). “Simply stated, the sentencing court sentences flesh-and-blood defendants[,] and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed.” **Walls**, [] 926 A.2d at 961.

The sentencing court’s institutional advantage is, perhaps, more pronounced in fashioning a sentence following the revocation of probation, which is qualitatively different than an initial sentencing proceeding. At initial sentencing, all of the rules and procedures designed to inform the court and to cabin its discretionary sentencing authority properly are involved and play a crucial role. However, it is a different matter when a defendant reappears before the court for sentencing proceedings following a violation of the mercy bestowed upon him in the form of a probationary sentence. For example, in such a case, contrary to when an initial sentence is imposed, the Sentencing Guidelines do not apply, and the revocation court is not cabined^[5] by Section 9721(b)’s requirement that “the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” 42 Pa.C.S.[A.] § 9721. **See Commonwealth v. Reaves**, [] 923 A.2d 1119, 1129 ([Pa.] 2007) (citing 204

⁵ “The **Pasture** Court’s use of this term does not imply that Section 9721(b) is now wholly irrelevant or inapplicable to VOP sentences Instead, at a VOP sentencing hearing, additional factors and concerns [of Section 9771] are in play.” **Derry**, 150 A.3d at 993–94.

Pa.Code. § 303.1(b) (Sentencing Guidelines do not apply to sentences imposed as result of revocation of probation)).^[6]

Upon revoking probation, “the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation.” 42 Pa.C.S.[A.] § 9771(b). Thus, upon revoking probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence, although once probation has been revoked, the court shall not impose a sentence of total confinement unless it finds that:

- (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 the court.

42 Pa.C.S.[A.] § 9771(c).

Moreover, 42 Pa.C.S.[A.] § 9721(b) specifies that in every case following the 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.” **See also** Pa.R.Crim.P. 708([D])(2) (indicating at the time of sentence following the revocation of probation, “[t]he judge shall state on the record the reasons for the sentence imposed.”).

However, following revocation, a sentencing court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statutes in question. Simply put, since the defendant has previously appeared before the sentencing court, the stated reasons for a revocation sentence need not be as elaborate as that which is required at initial sentencing. The rationale for this is obvious. When sentencing is a consequence of the revocation of probation, the trial judge is

⁶ The resentencing guidelines promulgated by the Pennsylvania Commission on Sentencing do not apply here because Fitzgerald committed his underlying offenses before January 1, 2020. 204 Pa.Code § 307.2(b).

already fully informed as to the facts and circumstances of both the crime and the nature of the defendant, particularly where . . . the trial judge had the benefit of a PSI during the initial sentencing proceedings.

Pasture, 107 A.3d at 27–28 (citation omitted); **accord Commonwealth v. Malovich**, 903 A.2d 1247, 1253 (Pa. Super. 2006) (“[A] lengthy discourse on the trial court’s sentencing philosophy is not required[; r]ather, the record as a whole must reflect the court’s reasons and its meaningful consideration of the facts of the crime and the character of the offender.” (citations omitted)).

“[A] trial court does not necessarily abuse its discretion in imposing a seemingly harsher post-revocation sentence where the defendant received a lenient sentence and then failed to adhere to the conditions imposed on him.”

Pasture, 107 A.3d at 28; **accord Schutzues**, 54 A.3d at 99 (citing **Reaves**, 923 A.2d at 1122 n.5). For example, it is reasonable to determine that a sentence of imprisonment for a defendant who absconded for three years is essential to vindicate the authority of the court. **Commonwealth v. Ortega**, 995 A.2d 879, 884 (Pa. Super. 2010) (citing **Commonwealth v. Carver**, 923 A.2d 495, 498 (Pa. Super. 2007)), *disapproved on grounds of what constitutes a violation by Commonwealth v. Foster*, 214 A.3d 1240 (Pa. 2019).

Here, the VOP court explained its determination that incarcerating Fitzgerald was necessary to vindicate the authority of the court. VOP Court Opinion at 5–6. The court described how it was provided with sufficient information to decide Fitzgerald’s sentence, including the relevant factors of

Section 9721(b). **Id.** at 7–8. Finally, the court reiterated its description of its reasons for sentencing based on Fitzgerald’s having absconded. **Id.** at 9–10.⁷

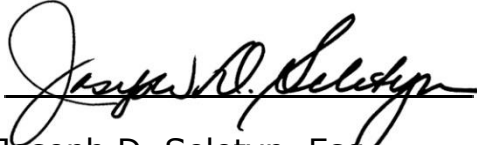
We find no abuse of discretion. Contrary to Fitzgerald’s argument, the VOP court was not required to impose the minimum confinement consistent with the sentencing factors. **Perry**, 32 A.3d at 240; **Walls**, 926 A.2d at 965. It was required to consider the relevant factors of Sections 9721(b) and 9771. **Pasture**, 107 A.3d at 27–28. We find the VOP court’s summary of its rationale to be adequate in light of the full record of factors presented to the court. **Malovich**, 903 A.2d at 1253. We discern no abuse of discretion in the VOP court’s finding that a sentence of total confinement was necessary to vindicate the authority of the court over Fitzgerald, who had absconded for three years. **Ortega**, 995 A.2d at 884. Thus, Fitzgerald is not entitled to relief.

Judgment of sentence affirmed.

⁷ Although Fitzgerald claims that the VOP court improperly considered a charge that was dismissed for lack of evidence, we disagree with that assessment. **See** VOP Court Opinion at 10 (explaining that the VOP sentence was based on Fitzgerald having absconded). Nonetheless, the VOP court would have been within its discretion to consider this charge. If a probationer is arrested and receives new charges that are *nolle prossed*, a VOP court can and should consider the totality of this evidence before imposing a sentence of total confinement. **Commonwealth v. Banks**, 198 A.3d 391, 403 (Pa. Super. 2018) (quoting **Commonwealth v. Ahearn**, 670 A.2d 133, 135 (Pa. 1996), and distinguishing **Commonwealth v. Brown**, 469 A.2d 1371 (Pa. 1983) (regarding charges *acquitted* by a jury)).

Further, Fitzgerald is inaccurate in his argument that the VOP court erred by not imposing the minimum possible confinement consistent with the sentencing factors. **Perry**, 32 A.3d at 240; **Walls**, 926 A.2d at 965 (noting that the phrase “minimum amount of confinement” was deleted in 1978).

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/5/2022