

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JAMES HART

Appellant

No. 211 MDA 2013

Appeal from the Judgment of Sentence December 19, 2012
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0000705-2010
CP-35-CR-0000999-2009

BEFORE: BENDER, P.J., LAZARUS, J., and FITZGERALD, J.*

MEMORANDUM BY LAZARUS, J.

FILED DECEMBER 18, 2013

James Hart appeals *pro se* from judgment of sentence of two to four years' imprisonment, entered in the Court of Common Pleas of Lackawanna County. We affirm.

Hart pled guilty on July 21, 2009 to one count of receiving stolen property ("RSP").¹ Thereafter, Hart underwent evaluation for intermediate punishment, but he was denied entry into the program. While awaiting sentencing, the Commonwealth brought additional charges against Hart, including a second count of RSP. On April 20, 2010, Hart pled guilty to the

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S. § 3925.

second count of RSP, and the court sentenced him to an aggregate term of 19 to 38 months' imprisonment followed by 48 months of special probation.²

On October 12, 2012, Hart was arrested a second time for violating the conditions of his parole. Specifically, Hart violated his curfew and subsequently failed to report to his parole officer. A **Gagnon I**³ hearing was scheduled, but never occurred.⁴ The court conducted a **Gagnon II** hearing on December 19, 2012, where, on the advice of Assistant Public Defender Curt Parkins, Esquire, Hart admitted to violating the conditions of his parole and probation. The court subsequently revoked Hart's probation and sentenced him to an aggregate term of two to four years' imprisonment to run consecutive to his current sentence. Sentencing Order, 12/19/12.

Both Hart, *pro se*, and his counsel, Assistant Public Defender Parkins, filed motions for reconsideration. The court denied both motions on January

² Hart's sentence for the first RSP charge was amended to a term of 19 to 38 months' imprisonment, followed by 46 months of special probation by court order dated April 23, 2010. However, this change is not reflected anywhere in the record other than the order granting said reduction.

³ **See Gagnon v. Scarpelli**, 411 U.S. 778 (1973).

⁴ It appears that Hart waived his right to a **Gagnon I** hearing, as well as a violation hearing, when he admitted to violating the conditions of his parole. Brief of Appellee, Exhibit 1.

8, 2013.⁵ This timely *pro se* appeal ensued,⁶ in which Hart presents three issues for our review:

1. Did the trial court abuse its discretion by re-sentencing [Hart] to a term of two to four years total confinement following a probation revocation hearing for technical violations?
2. Did the trial court abuse its discretion when it failed to grant [Hart] [a] **Gagnon I** hearing in violation of his due process rights and where it relied on information when re-sentencing him to total confinement that in violation [sic] [of] the collateral estoppel (res judicata) rule?
3. Did [Hart]'s counsel at the December 19, 2012 revocation hearing render ineffective assistance when he failed to challenge the trial court's abuse of discretion and where he failed to properly preserve appellant's issues for appeal concerning his request for consideration?

Brief of Appellant, at 4.

Hart's first two claims invoke the discretionary aspect of his revocation sentence, and his third claim questions the effectiveness of his plea and sentencing counsel.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right. An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test. We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal; (2) whether the

⁵ According to the docket for this case, a memorandum opinion was filed by Judge Michael Barrasse on 6/20/13. Although this Court was unable to obtain a copy of this memorandum, the record is sufficient to address Hart's issues on appeal.

⁶ On 4/30/13 Judge Vito Geroulo granted Hart's motion to proceed *pro se*.

issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code. Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or in a motion to modify the sentence imposed.

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.

Commonwealth v. Griffin, 65 A.3d 932, 935 (Pa. Super. 2013) (citations omitted).

Here, Hart filed a timely appeal and properly preserved his objection to the imposition of consecutive sentences in his motion to reconsider and modify sentence. Although Hart enumerates reasons for permitting this appeal in his Rule 2119(f) statement that differ from the reasons he addresses in his brief, we do not view this defect as fatal. Where Hart does fall short, however, is in demonstrating that there is a substantial question that the sentence appealed from is inappropriate.

Bald assertions of sentencing errors do not constitute a substantial question for appellate review. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1252 (Pa. Super. 2006). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. ***Id.*** An allegation that the sentencing court failed to consider certain mitigating factors

generally does not necessarily raise a substantial question. ***Commonwealth v. McNabb***, 819 A.2d 54, 57 (Pa. Super. 2003).

Here, Hart argues that the trial court failed to properly deliberate on the following considerations in choosing an appropriate sentence: Hart's age, his need for a drug treatment program, and that Hart followed his probation plan by maintaining employment. Brief of Appellant, at 8. Hart's allegation that the sentencing court failed to consider these factors does not raise a substantial question. ***See Commonwealth v. Cannon***, 954 A.2d 1222, 1228-29 (Pa. Super. 2008) (claim that trial court failed to consider defendant's rehabilitative needs, age, and educational background did not present substantial question); ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 793 (Pa. Super. 2001) (claim that sentence failed to consider defendant's rehabilitative needs and was manifestly excessive did not raise substantial question where sentence was within statutory guidelines and within sentencing guidelines); ***Commonwealth v. Coss***, 695 A.2d 831, 833 (Pa. Super. 1997) (when sentence imposed falls within the statutory limits, claim that sentence is manifestly excessive fails to raise substantial question).

Even if we were to determine that Hart's claim raised a substantial question, we find no merit in the underlying allegations. "Technical violations can support revocation and a sentence of incarceration when such violations are flagrant and indicate an inability to reform." ***Commonwealth v. Carver***, 923 A.2d 495, 498 (Pa. Super. 2007). 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; (2) the conduct of the defendant indicates that it is likely he will commit another crime; or (3) such a sentence is essential to vindicate the authority of the court. 42 Pa.C.S. § 9771(c).

In the present case, the sentence of total confinement was essential to vindicate the court's authority. Hart admitted that his violations were technical in nature, and had a long list of sanctions for previous violations. N.T. **Gagnon II** hearing, 12/19/12, at 5. At the **Gagnon II** hearing, the court expressed its concern regarding Hart's failure to realize that the rules apply to him like everyone else, and imposed the sentence of total confinement because of the repeated violations and a complete disregard for the rules. **Id.** at 6. Because of Hart's repeated conduct resulting in violations of the conditions of his probation, the court was warranted in imposing a sentence of total confinement in order to vindicate its authority.

Hart further argues that it was improper for the sentencing court to sentence him to a term of total confinement for a violation of probation which he had not yet begun serving. We disagree.

If, at any time before the defendant has completed the maximum period of probation, **or before he has begun service of his probation**, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting of the same would not be in subservience to the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation.

Commonwealth v. Ware, 737 A.2d 251, 253 (Pa. Super. 1999) (emphasis in the original). The court acted properly in revoking his probation based on the aforementioned violations.

Hart also contends that the trial court improperly relied on his pre-probation behavior when imposing a sentence of total confinement. To support this claim, Hart relies on 42 Pa.C.S. § 9771(d) and **Commonwealth v. Carver**, 923 A.2d 495 (Pa. Super. 2007) (42 Pa.C.S. § 9771(d) restrains court from considering facts occurring prior to imposition of probation when revoking probation). However, his reliance on these authorities is misplaced.

Here, the conduct considered by the trial court was not “pre-probationary” behavior. Rather, the state probation board provided a long list of sanction history for the court to consider. Although Hart’s previous probation violations occurred prior to the start of his special probation, he was nonetheless on probation. Therefore, the violations considered constituted probationary conduct, and Hart’s claim must fail.

Hart’s second claim raises two issues that we will address separately. First, Hart argues that the trial court abused its discretion in failing to grant him a **Gagnon I** hearing. A defendant is generally entitled to two separate hearings prior to revoking probation. **Commonwealth v. Cappellini**, 690 A.2d 122, 1227 n.4 (Pa. Super. 1996). The purpose of the first (**Gagnon I**) hearing is to “ensure against detention on allegations of violation that have no foundation of probable cause.” *Id.*, citing **Commonwealth v. Perry**,

385 A.2d 518, 520 (Pa. Super. 1978). The purpose of the second (**Gagnon II**) hearing is to determine whether facts exist to justify revocation of parole or probation. **Id.** However, we have previously held that, where a probationer fails to complain about the lack of a **Gagnon I** hearing before his probation is revoked, the claim is waived. **Perry, supra**, at 519.

Here, Hart did not complain about the lack of a **Gagnon I** hearing during his **Gagnon II** hearing after his revocation, or in his post-sentence motion. Rather, Hart first raised this issue on appeal. Due to his failure to preserve the issue in the trial court, Hart's complaint about the lack of a **Gagnon I** hearing is waived.⁷

Second, Hart contends that the trial court violated the "collateral estoppel (res judicata) rule" when it relied on information to re-sentence him to total confinement that was previously litigated in a prior proceeding. This issue has also been waived for failure to preserve it in the trial court. **See** Pa.R.A.P. 302(a) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Moreover, we do not see how the doctrine of collateral estoppel applies in this particular case.

⁷ Further, Hart waived his right to a **Gagnon I** hearing on October 17, 2012, when he signed a waiver form, which indicated that he was waiving his right to a preliminary hearing (**Gagnon I** hearing), a violation hearing, and counsel at those hearings. Brief of Appellee, Exhibit 1. Moreover, Hart admitted to the violations at his **Gagnon II** hearing, thereby negating any prejudice that may have arisen from the lack of a **Gagnon I** hearing. N.T. **Gagnon II** Hearing, 12/19/12, at 3.

Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” **Commonwealth v. Castro**, 856 A.2d 178, 181-82 (Pa. Super. 2004) (quoting **Commonwealth v. Brown**, 469 A.2d 1371, 1373 (Pa. Super. 1983)). Hart believes that the **Gagnon II** hearing judge was collaterally estopped from revoking his probation based on violations he was already found guilty of. Brief of Appellant, at 22.

Here, Hart’s previous violations were not being re-litigated; the Commonwealth was not attempting to prove that Hart was guilty of the same violations for a second time. Rather, the **Gagnon II** hearing judge considered Hart’s previous violations as factors in his determination that Hart lacked any regard for the rules. N.T. **Gagnon II** Hearing, 12/19/12, at 6. Accordingly, Hart’s reliance on the doctrine of collateral estoppel is misplaced and his claim must fail.

Hart’s third claim concerns the effectiveness of his counsel at the December 19, 2012 probation revocation hearing. We are unable to address Hart’s ineffective assistance claim at this time.

Hart argues that the transcripts from the revocation hearing in the certified record should be adequate to facilitate this Court’s review of his ineffective assistance of counsel claim. This assertion demonstrates Hart’s misunderstanding of **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2000) and its progeny.

Here, Hart attempts to apply to the exception created by the court in ***Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003), but does so incorrectly. To satisfy the exception created in ***Bomar***, the claim must be properly raised and preserved in the trial court; meaning, a hearing is conducted on the ineffectiveness claim and the trial court addresses the ineffectiveness claim in its opinion. ***Id.*** at 853. A transcript of a hearing where counsel allegedly rendered ineffective counsel fails to satisfy this exception.

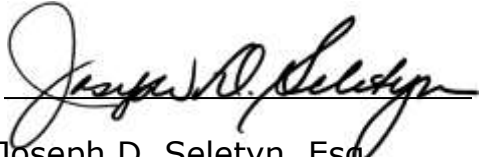
Furthermore, the Supreme Court of Pennsylvania recently reaffirmed ***Grant*** and held that, "claims of ineffective assistance of counsel are to be deferred to PCRA review; trial courts should not entertain claims of ineffectiveness upon post-verdict motions; and such claims should not be reviewed upon direct appeal." ***Commonwealth v. Holmes***, 40 MAP 2010, 41 (Pa. Super. October 30, 2013).

Because our review of the record indicates that Hart has not waived his right to seek PCRA review in the trial court and he has failed to satisfy the ***Bomar*** exception, we are precluded from remanding his claim of ineffective assistance of counsel at this time. However, Hart may raise his claim in a timely subsequent PCRA petition along with any other cognizable claims.

Judgment of sentence affirmed.

J-S53028-13

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: 12/18/2013