

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MARK STASNEY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2152 EDA 2012

Appeal from the Judgment of Sentence June 28, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008870-2010

BEFORE: BOWES, LAZARUS, and WECHT, JJ.

MEMORANDUM BY BOWES, J.:

FILED JANUARY 14, 2014

Mark Stasney appeals from the judgment of sentence of two and one-half years to seven years incarceration imposed by the trial court after it revoked his probation. We affirm.

Appellant originally entered a negotiated guilty plea to a third degree felony charge of theft from a motor vehicle on July 5, 2011.¹ The court issued a split sentence of eleven and one-half months to twenty-three months incarceration to be followed by three years of probation. Following a revocation of probation and parole hearing, the court revoked Appellant's probation and parole. Thereafter, on June 28, 2012, it re-sentenced Appellant for violating his probation to two and one-half to seven years

¹ The charge constituted a felony based on a recidivism enhancement.

incarceration.² Appellant did not timely file a post-sentence motion. Instead, he filed a timely notice of appeal on July 27, 2012. The court directed Appellant to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant filed his concise statement and also requested an extension to file a supplemental statement.

Subsequently, Appellant filed a supplemental concise statement, as well as a petition to accept a motion to reconsider his sentence as timely filed. Appellant indicated that an untimely post-sentence motion had been filed on July 10, 2012, one day late.³ However, the docket does not reflect such a filing, nor does the certified record contain such a document. The trial court originally denied the request to reconsider Appellant's sentence, indicating that it lacked jurisdiction. Despite the trial court's earlier order and acknowledgment that it lacked jurisdiction, this Court granted Appellant's petition for remand to the trial court and directed that court to consider Appellant's petition. On January 9, 2013, the court granted Appellant's request to consider the non-record motion as timely filed. It then held a hearing on the petition to vacate his sentence, and, on that

² The trial court afforded Appellant credit for time served; therefore, no illegal sentencing issue arises. **See *Commonwealth v. Crump***, 995 A.2d 1280, 1284 (Pa.Super. 2010).

³ The tenth day for filing the post-revocation sentence motion fell on a Sunday, July 8, 2012. Thus, Appellant had until July 9, 2012, to file a timely motion.

same date, issued an order denying Appellant's post-sentence motion. The trial court thereafter authored its Pa.R.A.P. 1925(a) decision, without discussion of the unusual procedural posture of the matter. The matter is now ready for this Court's review. Appellant presents the following issue for our consideration.

Did not the court below abuse its discretion in sentencing [A]ppellant to a term of two and one-half to seven years of total confinement for a technical violation of probation, where [A]ppellant had not been convicted of another crime, his conduct did not indicate that he was likely to commit another crime, and the sentence was not essential to vindicate the authority of the court; where the court failed to take into account the sentencing factors enumerated in the Sentencing Code and to give sufficient individualized consideration to [A]ppellant's background and rehabilitative needs; and where the sentence imposed was manifestly excessive?

Appellant's brief at 3.

Appellant's issue is a challenge to the discretionary aspects of his sentence. We recently clarified that our scope of review following revocation proceedings includes discretionary sentencing claims. ***Commonwealth v. Cartrette, Jr.***, 2013 PA Super 325 (*en banc*). Our standard of review in analyzing such sentencing claims is for an abuse of discretion. ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa.Super. 2010). Accordingly, we do not reverse unless the court commits an error of law or its sentence was the result of bias or ill-will. ***Id.***

In order to properly preserve a discretionary sentencing issue, a defendant must raise the issue at sentencing or in a post-sentence motion.

Id. In addition, the defendant must preserve the issue in a Pa.R.A.P. 1925(b) concise statement or errors complained of on appeal. **Commonwealth v. Naranjo**, 53 A.3d 66, 72 (Pa.Super. 2012). Furthermore, this Court ordinarily cannot review a discretionary sentencing matter unless the defendant provides a Pa.R.A.P. 2119(f) and presents argument that his claim raises a substantial question for this Court's review.

Id.

We begin by noting that no post-sentence motion is contained within the record. Moreover, the record reflects that Appellant did not timely file a post-sentence motion, nor did he, within the period in which the trial court retained jurisdiction, request the court to consider a post-sentence motion *nunc pro tunc*. Instead, well after the trial court lost jurisdiction, Appellant asked the trial court to consider a July 10, 2011 filing that is not contained in the record as a timely post-sentence motion. The trial court initially denied that order, accurately noting that it lacked jurisdiction. Thereafter, Appellant filed a petition for remand to the trial court with this Court. In a January 7, 2013 *per curiam* order, this Court directed the trial court to entertain Appellant's motion. Accordingly, it accepted Appellant's untimely post-sentence motion as timely filed.

It is evident that Appellant did not originally preserve his discretionary sentencing challenge in a timely post-sentence motion. While Appellant has attached to his brief a copy of his July 10, 2012 petition to vacate and reconsider sentence, which includes the issues he now raises on appeal, as

noted earlier, that petition is neither docketed nor contained in the certified record. Accordingly, Appellant's sentencing issue could be construed as waived. Nonetheless, due to the unusual procedural background and the fact that we expressly ordered the trial court to consider Appellant's petition to consider his post-sentence motion as timely filed, we will address the merits of Appellant's issue.

Appellant sets forth in his Pa.R.A.P. 2119(f) statement that his sentence was excessive and based solely on technical violations of probation, and that the trial court did not consider the factors delineated in 42 Pa.C.S. § 9721(b) and 42 Pa.C.S. § 9771(c). "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.'" **Crump, supra** at 1282. In addition, "arguments that the sentencing court failed to consider the factors proffered in 42 Pa.C.S. § 9721 does present a substantial question." **Commonwealth v. Dodge**, 2013 WL 4829286, 15 n.8 (Pa.Super. 2013). Accordingly, Appellant has forwarded a substantial question for our review.

As delineated in **Crump, supra** at 1282-1283 (internal citation omitted):

When imposing a sentence of total confinement after a probation revocation, the sentencing court is to consider the factors set forth in 42 Pa.C.S. § 9771. Under 42 Pa.C.S. § 9771(c), a court may sentence a defendant to total

confinement subsequent to revocation of probation 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 this court.

A revocation court also must look to the general sentencing standards provided in 42 Pa.C.S. § 9721(b). ***Commonwealth v. Williams***, 69 A.3d 735, 741 (Pa.Super. 2013). That provision reads in relevant part:

[T]he court shall follow the general principle 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. § 9721(b).

Appellant argues that his probation violations constituted failing to report to house arrest and his probation officer as well as admitting to using crack cocaine. Since he was not convicted of a crime, despite his admission to using illegal narcotics, he maintains that he “was not shown to have committed any new crime[.]” Appellant asserts that a sentence of confinement was unnecessary to protect the public nor did it further his rehabilitative needs. He relies on ***Commonwealth v. Parlante***, 823 A.2d 927 (Pa.Super. 2003) and ***Commonwealth v. Cottle***, 426 A.2d 598 (Pa. 1981), in support of his position.

In ***Parlante***, a panel of this Court reversed a four-to-eight-year revocation sentence where the trial court did not consider the defendant's age, family history, rehabilitative needs, that her underlying criminal offense was non-violent, and that her pertinent probation violations were technical. In ***Cottle***, our Supreme Court reversed a probation revocation sentence where the sentencing court imposed the statutory maximum sentence allowable for the defendant's failure to report to his probation officer. The probation department recommended that the defendant's probation be terminated and no sentence imposed due to his completion of an alcohol rehabilitation program and retaining permanent employment. The trial court rejected that recommendation and sentenced the defendant to two and one-half to five years incarceration. The Supreme Court found that the sentencing court's failure to appropriately consider 18 Pa.C.S. § 1371(c), now 42 Pa.C.S. § 9771, constituted error.

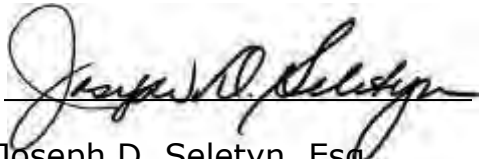
The Commonwealth responds that Appellant "overlooks his underlying offense of smashing a stranger's car window and stealing that man's belongings[.]" Commonwealth's brief at 7. It adds that Appellant has a lengthy criminal history, including twelve convictions. Further, it posits that Appellant admitted that he could not prevent himself from using crack cocaine to get high and admitted that he needed help. Finally, in a footnote, the Commonwealth notes that the sentencing court had the benefit of a pre-sentence investigation and considered that report in fashioning its sentence.

Instantly, we find that this matter is not analogous to either ***Parlante*** or ***Cottle***, and that the trial court did not abuse its discretion. As noted in ***Crump, supra***, “[a] sentencing court need not undertake a lengthy discourse for its reasons for imposing a sentence or specifically reference the statute in question [§ 9771], 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, supra*** at 1283. Here, the trial court had the benefit of a pre-sentence report and considered the appropriate sentencing factors under both § 9721 and § 9771. Appellant admitted to loving to smoke crack, which is a crime, and that he was in need of help. These facts indicate Appellant was in need of rehabilitation and likely to commit new drug offenses at the very least. The court set forth on the record that it was aware of Appellant’s twenty arrests and twelve convictions. The court was aware that Appellant had eighteen bench warrants and did not appear for his scheduled visits with his probation officer. Thus, prior efforts at rehabilitation were unsuccessful, and Appellant’s own admissions suggested he was likely to commit new drug crimes. Accordingly, Appellant’s issue fails.

Judgment of sentence affirmed.

J-S62007-13

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: 1/14/2014