

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

HOWARD K. WILLIAMS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2162 EDA 2012

Appeal from the Judgment of Sentence June 25, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No: CP-51-CR-0704621-2006

BEFORE: GANTMAN, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

FILED MAY 06, 2013

Appellant, Howard K. Williams, appeals from the judgment of sentence entered on June 25, 2012, following revocation of his probation. We affirm.

On April 11, 2007, Appellant entered a negotiated guilty plea to a violation of the Uniform Firearms Act (persons not to possess),¹ and the trial court sentenced him to a term of incarceration of time served to twenty-three months, followed by three years' probation. Appellant was released from prison on April 14, 2007, and in April 2008, he tested positive for cocaine use twice. He then failed to report to his probation officer, and on June 26, 2008, an absconder warrant was issued for his arrest. Police

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 6105(a)(1).

arrested Appellant nearly four years later, on June 1, 2012. The trial court revoked Appellant's probation on June 25, 2012, and sentenced him to a term of no less than two years and six months nor more than five years' incarceration, followed by three years' probation.² This timely appeal followed.³

Appellant raises the following issue for our review:

Was not the sentencing court's imposition of a sentence of not less than two and one half nor more than five years in prison followed by three years probation manifestly excessive and an abuse of discretion where the probation violation was technical and the first incurred by [Appellant] after his original 2007 sentence following a guilty plea; the court failed to give sufficient individualized consideration to [Appellant's] rehabilitative needs and health problems, or followed the requirements of 42 Pa.C.S. § 9771(c)?

(Appellant's Brief, at 3).

Appellant's sole issue on appeal challenges the discretionary aspects of his sentence.

A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. Two requirements must be met before we will

² Appellant filed a motion to reconsider the sentence on July 3, 2012.

³ Appellant filed a Rule 1925(b) statement on August 15, 2012, and the trial court filed a Rule 1925(a) opinion on September 18, 2012. **See** Pa.R.A.P. 1925.

review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists. Our inquiry must focus on the **reasons** for which the appeal is sought, in contrast to the **facts** underlying the appeal, which are necessary only to decide the appeal on the merits.

Commonwealth v. Ahmad, 961 A.2d 884, 886-87 (Pa. Super. 2008) (case citations, quotation marks, and footnote omitted) (emphases in original).

In the instant case, Appellant has included a Rule 2119(f) statement in his brief. (**See** Appellant's Brief, at 8-10). The statement asserts that Appellant's sentence of incarceration is "manifestly excessive" given that his probation was revoked for a technical violation, and that in formulating the sentence, the trial court failed to consider several factors relevant to his case, resulting in a "complete lack of individualized sentencing[.]" (***Id.*** at 8, 10). Because "[a] claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question[.]" we will review Appellant's sentencing issue on the merits. ***Commonwealth v. Simmons***, 56 A.3d 1280, 1286 (Pa. Super. 2012) (citation omitted) (concluding that appellant's claim that his sentence was manifestly excessive because trial court only considered whether he violated his probation, thereby depriving him of an individualized sentence, raised a substantial

question); **see also** *Commonwealth v. Sierra*, 752 A.2d 910, 913 (Pa. Super. 2000) (finding that a substantial question is presented on appeal from a revocation proceeding “when a sentence of total confinement, in excess of the original sentence, is imposed as a result of a technical violation of parole or probation.”).

When considering a sentence imposed after probation revocation, our standard of review is well-settled:

Our review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that it had at the time of the initial sentencing. 42 Pa.C.S.A. § 9771(b). Also, upon sentencing following a revocation of probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence.

Commonwealth v. Fish, 752 A.2d 921, 923 (Pa. Super. 2000) (case citations omitted).

In addition, Pennsylvania law provides that:

[O]nce 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; 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.

Commonwealth v. McAfee, 849 A.2d 270, 275 (Pa. Super. 2004), *appeal denied*, 860 A.2d 122 (Pa. 2004) (citation omitted); **see also** 42 Pa.C.S.A. § 9771(c). “Technical violations can support [probation] 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).

Here, Appellant claims that his sentence of incarceration is excessive given that his probation was revoked for a technical violation, and that in formulating its sentence, the trial court failed to consider several factors relevant to his case, including his rehabilitative needs and health problems. (**See** Appellant’s Brief, at 11-18). He argues that despite “the obvious fact that [he] was wanted for not reporting to his probation officer, [he] was seemingly living an otherwise law-abiding life[,]” and that a prison sentence was not warranted “merely because [he] relapsed into drug usage and homelessness.” (**Id.** at 15, 17). We disagree.

Appellant originally accepted a negotiated guilty plea to the firearms violation with an underlying sentence of a term of incarceration of time served to twenty-three months, plus three years’ probation. (**See** Sentencing Order, 4/11/07, at 1). When Appellant entered his plea, he acknowledged that he was subject to a maximum punishment of ten years’ incarceration. (**See** Written Guilty Plea Colloquy, 4/11/07, at 1). After the trial court determined that Appellant had violated the conditions of his probation by testing positive for drug use twice, by failing to report to his probation officer, and by absconding from supervision for nearly four years, the court revoked his probation and sentenced him to a term of incarceration of no less than two years and six months nor more than five years, followed

by three years' probation. (**See** N.T. **Gagnon II** Hearing, 6/25/12, at 6, 11, 16, 19; **see also** Revocation of Probation Sentence, 6/25/12, at 1). Therefore, the trial court imposed a sentence that was well within "the maximum sentence that it could have imposed originally at the time of the probationary sentence." **Fish, supra** at 923.

Further, Appellant's challenge to the discretionary aspects of his sentence fails to implicate the validity of the probation revocation proceeding or the authority of the trial court to consider the same sentencing alternatives that it had at the time of his initial sentencing. **See id.** A review of the record shows that the trial court was cognizant of Appellant's history and background in fashioning his sentence.

Specifically, at Appellant's probation violation hearing, the court stated that it had given due consideration to Appellant's "personal needs, the need for rehabilitation, [and] society's need for protection." (N.T. **Gagnon II** Hearing, 6/25/12, at 15). The court emphasized that Appellant's prior record reflected twenty-nine arrests and nine convictions, and that the court saw "very little by way of [Appellant's] efforts to rehabilitate[.]" (**id.** at 15-16). The court pointed out that it gave Appellant a minimal sentence on the firearms offense, and that instead of moving through his probationary term without incident, he flagrantly disregarded the requirements of his probation, and showed a lack of respect for the system by failing to report to his probation officer over a four-year period and by using drugs. (**See id.** at

16). The trial court's opinion reflects its determination that a sentence of incarceration "was essential to vindicate the authority of the court." (Trial Court Opinion, 9/18/12, at 4).

Based on this record, we conclude that the trial court properly considered all of the relevant factors it was required to take into account in rendering Appellant's sentence. **See McAfee, supra** at 275. Accordingly, Appellant's sole issue on appeal does not merit relief.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/6/2013