

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellee :
: v. :
: DARYLMIR LARKIN, :
Appellant : No. 2316 EDA 2011

Appeal from the Judgment of Sentence July 25, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0407151-2006

BEFORE: GANTMAN, DONOHUE and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 4, 2013

Darylmir Larkin (“Larkin”) appeals from the judgment of sentence entered on July 25, 2011 by the Court of Common Pleas, Philadelphia County, following a parole revocation hearing. Upon review, we vacate and remand for proceedings with this Memorandum.

The trial court summarized the factual and procedural histories of this case as follows:

In 2006, [Larkin] pled guilty before the Honorable Leon Tucker to violating 18 Pa. C.S.A. § 6106 of the Uniform Firearms Act and was sentenced to four years [of] probation. [Larkin’s] probation was revoked by Judge Tucker on February 18, 2010 and was given a new sentence of 5 years [of] probation. Because [Larkin] had tested positive for drugs on February 18th, [Larkin] was informed that he would be detained the ‘next hot urine after today.’ Additionally, [Larkin’s] case was given a status listing for July 15, 2010 to determine whether he had

*Retired Senior Judge assigned to the Superior Court.

paid his fines, stayed off drugs and had been actively seeking employment.

After receiving the new sentence, [Larkin] tested positive for drugs on March 4th, March 18th and May 3rd. Further, [Larkin] had not completed the required community service or paid the fines. On May 11, 2010, a bench warrant was issued. On May 17, 2010, [Larkin's] case was transferred to this court. [Larkin] was arrested on May 20, 2010 and a **Gagnon** I hearing was held. On June 10, 2010, a **Gagnon** II hearing was held before this court. [Larkin's] probation was revoked and he was sentenced to 11½ to 23 months [of incarceration] with immediate parole to FIR¹ when located; all original sentencing conditions were to remain.

Less than one month later, on July 7, 2010, [Larkin] was arrested for possession of a controlled substance. A bench warrant was issued for violation of parole on August 2, 2010 pursuant to this arrest. On August 12, 2010, another bench warrant was issued on [Larkin's] July 7th matter. He was not appended [*sic*] until January 12, 2011. On January 21, 2011, a **Gagnon** I hearing was held and a detainer was issued. On February 7, 2011, [Larkin] had a violation of [parole] hearing before this court, however, disposition was delay[ed] pending the outcome of the open July 7th case. [Larkin] was order to remain in custody during this period.

On June 8, 2011, Judge Frank Brady found [Larkin] guilty of violating 35 Pa. C.S.A. § 780-113(A16) and sentenced him to six months [of] reporting probation. Following his conviction for possession of a controlled substance, [Larkin's] violation of [parole] hearing was then held on July 25, 2011. At the culmination of this hearing, this court terminated

¹ FIR stands for Forensic Intensive Recovery Program, which, according to the trial court, "is a prison deferral initiative that offers eligible criminal offenders substance abuse treatment in lieu of incarceration." Trial Court Opinion, 7/10/12, at 5 n.1.

[Larkin's] parole and sentenced him to 1½ to 3 years [of] incarceration with credit for time served.

[] Larkin's timely appeal was filed on August 24, 2011. A Petition to Vacate or Reconsider an Illegal Sentence was filed on August 9, 2011 and denied. On September 1, 2011, this [c]ourt issued an order pursuant to Pa. R.A.P. 1925(b) for counsel to file a Statement of Errors no later than September 30, 2011. On September 30, 2011, a Statement of Matters Complained of on appeal and a Request for Extension on Time to File a Statement of Errors were submitted. [The trial court did not respond to Larkin's request. Instead, o]n February 3, 201[2], this court issued another order pursuant to Pa.R.A.P. 1925(b) for counsel to file a Statement of Errors no later than February 24, 201[2]. On February 17, 2012, counsel for [Larkin] submitted Statement of Matters Complained of on Appeal *nunc pro tunc* and requested that pursuant to 1925(b)(2) this Court accept the Statement as timely filed.

Trial Court Opinion, 7/10/12, at 1-3.

On appeal, Larkin raises a single issue for our review:

Did not the lower court impose an illegal sentence where, after finding that [Larkin] violated parole on an 11½ to 23 month county sentence, the court imposed a new sentence of 1½ to 3 years' incarceration in conflict with ***Commonwealth v. Holmes***, 933 A.2d 57 (Pa. 2007), in which the Pennsylvania Supreme Court reaffirmed settled precedent that a parole violator can only be recommitted to the remainder of the original sentence and not receive a new sentence?

Larkin's Brief at 3. Larkin raises a question of the legality of his sentence, and thus "our standard of review is plenary and is limited to determining

whether the trial court erred as a matter of law.” ***Commonwealth v. McKee***, 38 A.3d 879, 881 (Pa. Super. 2012).

In its 1925(a) opinion, the trial court erroneously referred to the hearing in question as a “violation of probation hearing[.]” Trial Court Opinion, 7/10/12, at 2. Although often confused, the difference between a violation of probation and a violation of parole is important in this instance. As our Supreme Court has explained:

As commonly defined, probation is ‘[a] sentence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration.’ Black’s Law Dictionary, 835 (6th ed.1991). Conversely, parole is the ‘[r]elease from jail, prison or other confinement after actually serving part of the sentence. Conditional release from imprisonment which entitles parolee to serve remainder of his term outside the confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order.’ ***Id.*** at 770. As is relevant, a court faced with a violation of probation may impose a new sentence so long as it is within the sentencing alternatives available at the time of the original sentence. 42 Pa.C.S. § 9771(b) (‘Upon revocation [of 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.’). In contrast, a court faced with a parole violation must recommit the parolee to serve the remainder of the original sentence of imprisonment, from which the prisoner could be reparaoled. ***See Commonwealth v. Fair***, 345 Pa.Super. 61, 497 A.2d 643, 645 (1985) (‘The power of the court after a finding of violation of parole in cases not under the control of the State Board of Parole is ‘to recommit to jail....’ There is no

authority for giving a new sentence with a minimum and maximum.’ (internal citation omitted)).

Commonwealth v. Holmes, 593 Pa. 601, 630 n.5, 933 A.2d 57, 74 n.5 (2007).

The record reflects that Larkin was not sentenced to a term of probation on June 10, 2010 – the sentence at issue at the July 25, 2011 violation hearing. Rather, that order sentenced him “[t]o be confined for a Minimum Term of 11 months and 15 days and a Maximum Term of 23 months[.]” Order – VOP Hearing, 6/10/10. The order further required that Larkin undergo an FIR evaluation to receive “immediate parole” to an FIR program once one was located. ***Id.*** Moreover, the trial court clearly recognized that Larkin had violated parole, as opposed to probation, as the order issued at the July 25, 2011 violation hearing states: “PAROLE ORDERED TERMINATED”; it does not reference suspected probation violation. ***See*** Order – Violation Hearing, 7/25/11. Thus, it is clear that the July 25, 2011 order at issue on appeal is for a violation of parole, not probation.

The trial court justifies its sentence on the premise that Larkin was sentenced “following the revocation of county intermediate punishment.”² Trial Court Opinion, 7/10/12, at 4. Larkin argues that this conclusion is in

² Following revocation of a sentence of county intermediate punishment, the trial court may resentence the offender to any of the sentencing alternatives that were available at the time of the original sentence. 42 Pa.C.S.A. § 9773(b).

error, as the trial court did not sentence him to county intermediate punishment,³ but instead sentenced him to serve a term of imprisonment, granted him immediate parole, and as a condition of parole, required him to reside in a FIR program. Larkin's Brief at 9.⁴ We agree.

As stated above, the record reflects the trial court sentenced Larkin to a term of imprisonment at the June 10, 2010 violation hearing. Order – VOP Hearing, 6/10/10. The trial court further ordered that Larkin receive “immediate parole” once an FIR program was located, which, according to the trial court, occurred within one month of the June 10 order. *Id.*; Trial Court Opinion, 7/10/12, at 6. The order provides no indication that attendance at an FIR program was intended to be a county intermediate punishment program. The referral to the FIR program was a condition of parole.⁵ Contrary to the trial court's identification of Larkin as an “eligible

³ “County intermediate punishment program” is defined as “[a] residential or nonresidential program provided in a community for eligible offenders.” 42 Pa.C.S.A. § 9802. An “eligible offender” is, in relevant part, “a person convicted of an offense who would otherwise be sentenced to a county correctional facility, who does not demonstrate a present or past pattern of violent behavior and who would otherwise be sentenced to partial confinement pursuant to section 9724 (relating to partial confinement) or total confinement pursuant to section 9725 (relating to total confinement).” *Id.*

⁴ The Commonwealth failed to file a responsive brief on appeal.

⁵ Requirements regarding where the offender lives and that he or she receive drug and alcohol treatment are commonly included as conditions of parole. *See Fross v. County of Allegheny*, 610 Pa. 421, 439-40, 20 A.3d 1193, 1204 (2011) (citing cases).

offender” based upon the fact that Larkin “**would have** been sentenced to total confinement,” the record reflects that Larkin **was** sentenced to a term of total confinement. **Compare** Trial Court Opinion, 7/10/12, at 6 (emphasis added), **with** Order – VOP Hearing, 6/10/10. Because the June 10 order did, in fact, sentence him to a term of total confinement, the June 10 order cannot be construed as a sentence of county intermediate punishment, which is a placement made in lieu of a term of total confinement. **See** 42 Pa.C.S.A. § 9802; **supra**, n.3

For the foregoing reasons, we conclude that the June 10, 2010 order placed Larkin on immediate parole. Upon his subsequent conviction for possession of a controlled substance, Larkin was found in violation of parole on July 25, 2011. As such, the trial court erred by sentencing Larkin to a new term of imprisonment. **See Holmes**, 593 Pa. at 630 n.5, 933 A.2d at 74 n.5.

Judgment of sentence vacated. Case remanded for proceedings consistent with this Memorandum. Jurisdiction relinquished.