

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JEFFREY SICKLE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2969 EDA 2011

Appeal from the Judgment of Sentence November 27, 2007
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0803961-2000

BEFORE: STEVENS, P.J., BOWES, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.:

Filed: January 14, 2013

Jeffrey Sickle appeals *nunc pro tunc* from the November 27, 2007 judgment of sentence of two to four years imprisonment that was imposed following revocation of a probationary sentence. We affirm.

On April 20, 2001, Appellant pled guilty to attempted theft by unlawful taking graded as a third degree felony after he tried to steal a van owned by Margaret Beringer. He was sentenced to three years probation, which was revoked on December 4, 2002, for reasons that do not appear in the record. At that time, Appellant was sentenced to six to twenty-three months in jail, was immediately paroled to a drug treatment program, and was again given three years probation. Appellant's second probation violation ruling was

* Retired Senior Judge assigned to the Superior Court.

rendered on December 16, 2003, when he was sentenced to the time imposed in 2002 that he did not serve. A third probation violation proceeding was instituted in 2004. On March 15, 2005, based upon the third probation violation, Appellant was sentenced to one to two years imprisonment and to a consecutive term of four years probation. This sentence was imposed concurrently to a sentence Appellant was serving in a different matter.

On November 27, 2007, Appellant's probation was revoked for a fourth time, and he was sentenced to two to four years incarceration.¹ Appellant's probation was revoked on this occasion due to the fact that Appellant committed a direct violation when he pled guilty to theft by unlawful taking. Appellant also had committed technical violations by failing to report to his probation office and by changing his residence without permission.

On August 11, 2008, Appellant filed a timely *pro se* PCRA petition to this final revocation sentence. Counsel was appointed, filed an amended petition on July 10, 2009, and submitted a supplemental amended petition on March 16, 2011. Appellant averred that he communicated to his prior

¹ The statutory maximum sentence for a third degree felony is seven years imprisonment. 18 Pa.C.S. § 1103 (3). It is impossible from the record to ascertain if Appellant was incarcerated for more than this period of time. It would depend on whether Appellant was paroled during his previous two terms of incarceration. However, the issue, which relates to the legality of sentence, is moot since Appellant's maximum sentence was reached on November 27, 2011.

counsel that he wanted a motion for reconsideration of the November 27, 2007 sentence to be filed and that he wanted to appeal from the sentence. Following a hearing held on September 23, 2011, the PCRA court granted, with the Commonwealth's assent, reinstatement of Appellant's appellate rights from the November 27, 2007 sentence. However, Appellant was not accorded the right to file a motion for reconsideration of sentence *nunc pro tunc*. In this ensuing appeal, Appellant raises this issue, "Is the Defendant entitled to a remand to the Sentencing Court where that Court abused its discretion at [the] time of sentence when it imposed a sentence to two (2) to four (4) years with said sentence being manifestly excessive under all of the circumstances?" Appellant's brief at 3.

Initially, we set forth our standard of review in the revocation-of-probation setting. "Generally, in reviewing an appeal from a judgment of sentence imposed after the revocation of probation, this Court's scope of review includes the validity of the hearing, the legality of the final sentence, and if properly raised, the discretionary aspects of the appellant's sentence." ***Commonwealth v. Kuykendall***, 2 A.3d 559, 563 (Pa.Super. 2010). Additionally, "Revocation of a probation sentence is a matter committed to the sound discretion of the trial court and that court's decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion." ***Commonwealth v. Perreault***, 930 A.2d 553, 557-558 (Pa.Super. 2007). A revocation court may impose a sentence of total

confinement if, *inter alia*, the defendant was convicted of another crime. 42 Pa.C.S. § 9771(c); ***Commonwealth v. Crump***, 995 A.2d 1280 (Pa.Super. 2010). Since Appellant was convicted of another crime, the sentence of total imprisonment was therefore legally authorized.

The question raised on appeal is whether the length of total confinement imposed by the court was excessive, which is a question that relates to the discretionary aspects of the sentence imposed. However, Appellant failed to raise any sentencing issues in a post-sentence motion nor did he complain about the duration of his sentence during the revocation proceeding. “Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived.” ***Commonwealth v. Shugars***, 895 A.2d 1270, 1273–1274 (Pa.Super. 2006) (quoting ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa.Super. 2005)).

Similarly, in ***Commonwealth v. Kalichak***, 943 A.2d 285 (Pa.Super. 2008), we held that when a court revokes probation and imposes a new sentence, a criminal defendant needs to preserve challenges to the discretionary aspects of that sentence either by objecting during the revocation sentencing or by filing a motion for reconsideration of sentence. ***See also*** Pa.R.Crim.P. 708(D). Otherwise, an objection to a discretionary aspect of a sentence is waived. As Appellant failed to raise any issues

relating to the discretionary aspects of the judgment of sentence during the sentencing proceedings or in a post-sentence motion, any claim of excessiveness is waived. He must pursue any question relating to counsel's default in neglecting to preserve this issue in a post-conviction setting.

Judgment of sentence affirmed.

P.J. Stevens Concurrs in the Result.