

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHRISTOPHER J. GANGES,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3047 EDA 2009

Appeal from the Judgment of Sentence September 14, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1301408-2006, MC-51-CR-1306099-
2006

BEFORE: BOWES, GANTMAN, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.:

Filed: March 8, 2013

Christopher J. Ganges appeals from the two-to-four-year judgment of sentence that was imposed after he was found to be in violation of the terms of a probationary sentence. We affirm.

At approximately 8:00 p.m. on October 19, 2006, two patrolling Philadelphia police officers observed Appellant and other men loitering on the street in front of 435 East Penn Street, Philadelphia. When police exited their vehicle, Appellant fled, grabbed his waistband, and attempted to enter a locked building. Appellant was stopped and found in possession of a loaded hand gun. As a result of this incident, Appellant was charged with carrying a firearm with an altered or obliterated identification number by a person not to possess a weapon, carrying a firearm with an altered or

obliterated identification number, carrying an unlicensed firearm, and carrying a firearm on a public street in Philadelphia.

On January 2, 2007, Appellant pled guilty to carrying an unlicensed firearm by a person who is not authorized to possess one, which is a third degree felony, and he received three years probation. On June 28, 2007, for reasons that do not appear of record, Appellant's probation was revoked, and he was sentenced to time served to twenty-three months incarceration followed by two years probation and was immediately paroled. Thus, his June 28, 2007 sentence of imprisonment would have expired on May 28, 2009, and the ensuing probation would have ended on May 28, 2011. Instead, on July 5, 2007, one week after he was paroled, an arrest warrant was issued for Appellant based upon his commission of another offense. He was therefore charged herein with violating the terms of his parole and probation.

According to the docket, Appellant's violation of parole/probation hearing was continued numerous times. Specifically, violation hearings were scheduled and canceled for November 21, 2008, December 19, 2008, February 9, 2009, August 7, 2009, August 13, 2009, August 19, 2009, September 1, 2009, and September 3, 2009. A hearing was finally conducted on September 14, 2009, when the only issue was whether his probationary sentence should be revoked.

At the violation of probation (“VOP”) proceeding, the Commonwealth established the following. Appellant was arrested on July 3, 2007, for carrying an unlicensed weapon. On April 28, 2008, he was convicted of and sentenced on that offense to one and one-half years to three years in jail followed by three years probation. Based on the sixteen-and-one-half-month delay between his conviction of the other offense and the conduct of the probation violation hearing in this matter, Appellant objected and asked for dismissal of the VOP proceeding.

The court discussed the reasons for the delays in the hearing that occurred after Appellant’s conviction of the other offense. It indicated that Appellant had requested one continuance based on his inability to ascertain who was representing him. A number of the other cancellations were due to the fact that the hearing was to be videotaped and arrangements were not in place for videotaping on the days in question. Based on these facts, the trial court denied Appellant’s request for dismissal and sentenced him to two to four years incarceration. That sentence was imposed consecutively to the sentence in the other criminal matter.

Appellant filed a timely notice of appeal from the judgment of sentence and was ordered to file a Pa.R.A.P. 1925(b) statement. Appellant asked for a continuance to file that document until transcription of the probation violation hearing. On February 10, 2011, prior to transcription of the September 14, 2009 proceeding, counsel filed a statement of matters

complained of on appeal and indicated her intent to file an *Anders* brief. It was not until February 14, 2012, that the transcript of the probation violation proceeding was filed simultaneously with a Pa.R.A.P. 1925(a) opinion.

After the record was transmitted to this Court, counsel petitioned for remand to file another Pa.R.A.P. 1925(b) statement and averred therein that she had discovered a meritorious issue to raise on appeal. We granted the requested relief, and the new statement raised the allegation that there was an improper delay between the VOP and the conduct of a hearing. The court prepared a new opinion in support of its ruling as to this issue, and the matter is now ready for review. Appellant presents this question, "Was not appellant denied his right to a speedy revocation hearing under Pa.R.Crim.P. 708, where his hearing was not held until eighteen months after the disposition of his direct violation, and appellant was prejudiced by the unreasonable delay?" Appellant's brief at 3.

Initially, we must note that Appellant represents in his brief that he was convicted in the other matter on February 27, 2008. Appellant's brief at 9. However, the notes of testimony of the probation violation hearing establish that in the criminal matter that resulted in the probation violation, Appellant was convicted and sentenced "on April 28, 2008." N.T. Hearing, 9/14/09, at 4. Hence, we use the latter date for purposes of our analysis,

and there was a sixteen-and-one-half rather than eighteen-month delay in the conduct of a hearing.

Our standard of review in the VOP setting is as follows:

The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. An abuse of discretion is more than an error in judgment—a sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Simmons, 56 A.3d 1280, 1283-84 (Pa.Super. 2012) (citation omitted).

Pa.R.Crim.P. 708 outlines the procedures in the VOP setting and mandates, in pertinent part, that “a hearing [be] held as speedily as possible at which the defendant is present and represented by counsel[.]” Pa.R.Crim.P. 708 (B)(1). “The language ‘speedily as possible’ has been interpreted to require a hearing within a reasonable time.” ***Commonwealth v. Christmas***, 995 A.2d 1259, 1262 (Pa.Super. 2010). There is no prescribed period in which the VOP hearing must be conducted. Instead, the controlling inquiries are whether the delay was reasonable under the circumstances and whether the defendant was prejudiced by the postponement. ***Id.*** Thus, when we determine if a delay was reasonable, we apply three factors: “the length of the delay; the reasons for the delay; and the prejudice resulting to the defendant from the delay.” ***Id.*** at 1263.

We compute delay as commencing with the date of the conviction that triggered the revocation and as ending with the date of the hearing. *Id.* While a delay of nine months is “not ‘intrinsically reasonable,’” *Commonwealth v. Woods*, 965 A.2d 1225, 1228 (Pa.Super. 2009), (citation omitted), a twenty-month deferral is considered unreasonable, *Christmas, supra*. However, even an unacceptable period of delay will not be considered presumptively prejudicial. *Id.*

When a hearing is held outside the parameters of what is considered reasonable under Pa.R.Crim.P. 708, we do not automatically vacate the VOP finding. Instead, we examine if the reason for the delay is sound. “When examining the reasons for the delay, the court looks at the circumstances surrounding the delay to determine whether the Commonwealth acted with due diligence in scheduling the revocation hearing.” *Id.* Postponement occasioned by the defendant or agencies outside the Commonwealth control are not imputed against the Commonwealth. *Id.* (Commonwealth is not responsible for delays caused by defendant); *Commonwealth v. Clark*, 847 A.2d 122 (Pa.Super. 2004) (defendant could not be brought down from state to county jail due to lack of beds in county facility; four-year deferral of hearing was not attributable to Commonwealth).

Finally, even when the Commonwealth is responsible for an unacceptable delay, to “demonstrate a violation of his right to a speedy probation revocation hearing, a defendant must allege and prove the delay

in holding the revocation hearing prejudiced him.” *Christmas, supra* at 1263. We have observed:

Prejudice in this context has been interpreted as being something which would detract from the probative value and reliability of the facts considered, vitiating the reliability of the outcome itself. One specific purpose of our rule in requiring a prompt revocation hearing is to avoid such prejudice by preventing the loss of essential witnesses or evidence, the absence of which would contribute adversely to the determination. Another is to prevent unnecessary restraint of personal liberty.

Id.

Applying these principles herein, it is apparent that the delay of sixteen and one-half months was unreasonable. However, the Commonwealth cannot be held responsible for this delay since it resulted from one continuance request from the defendant and the failure of prison and court officials to coordinate the videotaping arrangements for the hearing. The Commonwealth had no control over those personnel.

Finally, and most significantly, there is the absence of prejudice. Appellant does not allege that he lost evidence that would have refuted that he violated his probation. Rather, Appellant suggests that he was denied parole in January 2009 in the other criminal matter, in part, based on the pending violation proceeding. Appellant’s brief at 11; *see also* N.T. Hearing, 9/14/09, at 7 (Appellant represented that he was denied parole “in part because of this matter still holding him.”). Significantly, Appellant did not attempt to establish that he would have been granted parole and his

liberty without the pendency of the probation violation proceeding; it was merely one factor in the discretionary decision as to whether to grant parole. Hence, we are precluded from making a finding that Appellant was denied parole in January 2009 based upon the pendency of this matter as that fact is de hors the record. ***Spuck v. Pennsylvania Bd. of Probation and Parole***, 990 A.2d 725 (Pa. 2010) (matters “de hors the record . . . cannot be considered.”).

Thus, Appellant was incarcerated on July 7, 2007, due to his other firearm conviction and was still serving his eighteen-to-thirty-six-month sentence when the present hearing was held on September 14, 2009. The law is clear, “If a defendant is already incarcerated on the charges that triggered the probation revocation, he cannot claim the delay in holding his revocation hearing caused him any loss of personal liberty.” ***Id.*** Since, on September 14, 2009, when the present probation revocation hearing was conducted, Appellant remained jailed on the other charges, he cannot establish a loss of personal liberty. Thus, he does not sustain a finding of prejudice.

In light of these facts, ***Christmas, supra***, proves dispositive. In that case, we refused to vacate a probation violation sentence where there was a twenty-month delay between the conviction resulting in the violation and the violation hearing. The delay was due to the fact that the defendant was never brought to the VOP hearing. We concluded both that the delay was

not reasonable and that the Commonwealth had not exercised due diligence in securing the defendant's presence at the probation hearing. Nevertheless, we declined to vacate the probation sentence due to the fact that the defendant failed to establish prejudice. We noted that the defendant did not lose proof that would have exonerated him of the violation. We also observed that the defendant was incarcerated on the other charges during the twenty-month delay so that he did not lose personal liberty due to the postponement in the proceedings. Thus, even though there was more of a delay in *Christmas* than that herein, we declined to vacate the violation finding.

Similarly, in *Clark, supra*, there was a four-year delay between the conviction leading to the revocation and the revocation hearing. While we considered that lag unreasonable, we noted that the defendant was serving a sentence on the offense that generated the probation violation during the period that the VOP hearing was deferred. We therefore found a lack of prejudice and upheld the revocation.

In light of the facts and the applicable law, we cannot conclude that there is a valid ground for vacating the present judgment of sentence based on the sixteen-and-one-half-month delay presented herein.

Judgment of sentence affirmed.