

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
JASON RIVERA,	:	No. 3189 EDA 2011
	:	
Appellant	:	

Appeal from the Judgment of Sentence, November 2, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0001427-2010

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
JASON RIVERA,	:	No. 3190 EDA 2011
	:	
Appellant	:	

Appeal from the Judgment of Sentence, November 2, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0004871-2010

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
JASON RIVERA,	:	No. 3191 EDA 2011
	:	
Appellant	:	

Appeal from the Judgment of Sentence, November 2, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0015857-2010

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.:

Filed: March 12, 2013

Jason Rivera appeals from the judgment of sentence of November 2, 2011, following revocation of his probation. We affirm.

We will briefly summarize the procedural history of this matter. Appellant was charged with three separate possession with intent to deliver cases along with related offenses at CP-51-CR-0001427-2010, CP-51-CR-0004871-2010 and CP-51-CR-0015857-2010. On May 11, 2010, appellant entered into a negotiated guilty plea of 11½ to 23 months' incarceration followed by 72 months' probation.

On November 2, 2010, appellant was arrested for selling drugs. On January 31, 2011, appellant entered an open guilty plea to possession with intent to deliver crack cocaine and was sentenced to 72 months' probation. The trial court found appellant to be in direct violation of his parole and probation and revoked both. The court sentenced appellant to serve the remainder of his back time to be followed by an aggregate term of 72 months' probation.

On April 18, 2011, the trial court granted appellant early parole to an inpatient drug treatment facility at Eagleville Recovery in Eagleville, Pennsylvania. On May 9, 2011, appellant was transported to Eagleville, and left the facility, without permission, two days later. Appellant failed to report

to his probation officer. Wanted cards were issued for him, but his whereabouts remained unknown until he was arrested on June 18, 2011 and charged with possession of marijuana.

On July 26, 2011, appellant appeared before the trial court for a violation of probation (***Gagnon I***)¹ hearing. Appellant attempted to explain his month long absence from drug treatment by claiming that he had to attend his grandfather's funeral. (Notes of testimony, 7/26/11 at 6.) At a combined ***Gagnon II*** and sentencing hearing on November 2, 2011, the trial court noted that appellant lasted two days at his drug treatment program and that he failed to pay any court ordered fines or mandatory court costs. (Notes of testimony, 11/2/11 at 12, 22). The court found appellant in violation, revoked probation and sentenced him to an aggregate term of 36 to 74 months' incarceration to be followed by 48 months' probation. Post-sentence motions were not filed, and this appeal followed.

¹ ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973).

A [***Gagnon I***] hearing is a pre-revocation hearing to determine if probable cause exists that a violation was committed. After this determination is made, a [***Gagnon II***] hearing is conducted where the Commonwealth is required to establish that the defendant did violate his parole/probation. The [***Gagnon***] decision has become the common moniker for both parole and probation revocation proceedings.

Commonwealth v. Stafford, 29 A.3d 800, 801 n.1 (Pa.Super. 2011) (citation omitted).

Appellant first argues that the trial court erred in finding he was in violation of his probation/parole. It is well settled that the 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. Smith***, 669 A.2d 1008, 1011 (Pa.Super. 1996).

At a probation revocation hearing, the Commonwealth need only prove by a preponderance of the evidence that a defendant violated a condition of probation, and that probation was not an effective rehabilitation tool. ***Commonwealth v. Sims***, 770 A.2d 346, 350 (Pa.Super. 2001); ***Commonwealth v. DelConte***, 419 A.2d 780, 781 (Pa.Super. 1980).

Here, the trial court explained:

[W]here defendant was paroled by this court's order for him to attend Eagleville Recovery for an Intensive Residential Assessment, walked out of the facility two days later, did not report to probation after speaking directly to the officer and being instructed to report that day, never reported, was captured only because he was picked up on another arrest, and never paid any of his fines and costs, he clearly violated his parole/probation.

Trial court opinion, 4/19/12 at 6.

Appellant concedes that he left drug treatment without notifying the court or his probation officer and did not return. (Appellant's brief at 9.) Appellant, however, maintains that the court should not have revoked his probation because "his technical violations were not violent and were due to

his drug addiction.” (Appellant’s brief at 10.) We reject appellant’s argument.

It is well-settled that “technical” violations alone are sufficient to support the court’s finding that probation was not conducive to appellant’s rehabilitation. **See** 42 Pa.C.S.A. § 9771(b) (“[t]he court may revoke an order of probation upon proof of the violation of specified conditions of probation”); **Commonwealth v. Sierra**, 752 A.2d 910, 912 (Pa.Super. 2000) (technical violations alone are sufficient to trigger revocation); **Commonwealth v. Mitchell**, 632 A.2d 934, 937 (Pa.Super. 1993) (technical violations, including failure to report to parole officer and pay court fines, justified revocation of parole).

Appellant also claims that revocation was improper because his violations “were due to his drug addiction.” We observe that it was because of his drug addiction that the court ordered him to serve his sentence in a drug treatment facility. Appellant promptly left that facility after being there for two days. We note appellant later claimed he left in order to attend his grandfather’s funeral. However, when a probation officer investigated this claim and asked appellant for his grandfather’s name, he responded, “I don’t know his name.” (**See** trial court opinion, 4/19/12 at 5.)

Based on the above, the evidence was sufficient to support appellant’s revocation of probation.

Next, appellant argues the sentence was excessive and an abuse of discretion in light of the violation committed. Initially, we note that appellant did not raise this claim in a post-sentence motion or at the sentencing hearing. To properly preserve the discretionary aspects of sentencing for appellate review, the issue must be raised during sentencing or in a timely post-sentence motion. *See Commonwealth v. Nischan*, 928 A.2d 349, 355 (Pa.Super. 2007), ***appeal denied***, 594 Pa. 704, 936 A.2d 40 (2007). Appellant has done neither; therefore, this issue is waived.

The judgment of sentence is affirmed