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J-S29003-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LORNE J. COOKE,	:	
	:	
Appellant	:	No. 3501 EDA 2010

Appeal from the Judgment of Sentence December 1, 2010,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0001772-2008

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LORNE J. COOKE,	:	
	:	
Appellant	:	No. 3437 EDA 2010

Appeal from the Judgment of Sentence December 1, 2010,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0002812-2009

BEFORE: DONOHUE, MUNDY and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED MAY 29, 2013

Appellant, Lorne J. Cooke ("Cooke"), appeals the judgments of sentence in these two appeals, raising issues related to the discretionary aspects of his sentences in both cases. For the reasons that follow, we affirm.

On April 28, 2008, Cooke plead guilty to burglary, 18 Pa. C.S.A. § 3502, at docket number CP-51-CR-0001772-2008, before the Honorable Judge Ellen Ceisler. Judge Ceisler sentenced Cooke to a term of incarceration of 11½ to 23 months, followed by four years of probation. Judge Ceisler permitted Cooke to serve his sentence on work release.

While on work release, Cooke committed another burglary. On January 16, 2009, Cooke was arrested and charged at docket number CP-51-CR-0002812-2009.¹ On January 26, 2010, Cooke entered an open guilty plea to burglary, theft by unlawful taking of movable property, 18 Pa. C.S.A. § 3921, possessing an instrument of crime, 18 Pa. C.S.A. § 907, and receiving stolen property, 18 Pa. C.S.A. § 3925. The Honorable Judge Roxanne Covington sentenced Cooke to a term of incarceration of 11½ to 23 months, to be served on house arrest, followed by three years of probation.

On December 1, 2010, Cooke appeared before Judge Ceisler for a violation of probation hearing. The evidence presented showed that in addition to having been convicted of new crimes (*i.e.*, at CP-51-CR-0002812-2009), Cooke had also repeatedly violated the terms of his house arrest. He tested positive for cocaine use on July 16, 2010, July 30, 2010, August 13, 2010, October 19, 2010, and November 2, 2010, and walked out of two other drug tests without completing them. N.T., 12/1/10, at 4-5. In

¹ As a result of this arrest, Cooke served the remainder of his sentence at CP-51-CR-0001772-2008 in confinement. He was paroled on December 6, 2009.

addition, Cooke violated the terms of his house arrest by leaving his home, even though he had been warned not to go even so far as the front porch or steps. *Id.* at 5-6. Judge Ceisler noted that neither work release nor house arrest had worked for Cooke, *id.* at 12, and she sentenced him to a term of incarceration of 2½ to 7 years.

On December 10, 2010, Cooke appeared before Judge Covington, at which time she revoked his probation and terminated his parole. For his multiple failures to comply with the terms of his house arrest (including to refrain from using drugs and to participate in drug treatment), Judge Covington sentenced Cooke to a term of incarceration of 18 to 36 months, to run concurrently with the sentence imposed by Judge Ceisler.

Cooke has appealed both of these sentences. At docket number 2010 EDA 3501, Cooke has appealed the sentence imposed by Judge Ceisler, raising the following issue for our determination:

Was not the lower court's imposition of two and a half to seven years confinement manifestly excessive and an abuse of discretion where the court failed to give any consideration to [Cooke's] individualized circumstances and failed to explain how, as a matter of law, this sentence was the least stringent one adequate to protect the community and to serve the individual needs of [Cooke].

Cooke's Brief at 3. At docket number 2010 EDA 3437, Cooke has appealed the sentence imposed by Judge Covington, raising the following issue for our consideration and review:

Was not the state sentence of one and a half to three years confinement imposed in violation of 42 Pa. C.S. § 9771(c) for [Cooke's] technical violations given that all of [Cooke's] infractions were a result of his addictions, he had no direct violations and the sentence was not essential to vindicate the lower court's authority.

Cooke's Brief at 3.

Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa. Super. 2000). An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa. Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted); **see also *Commonwealth v. Glass***, 50 A.3d 720, 726 (Pa. Super. 2012).

We begin with the appeal of Judge Ceisler's sentence at docket number 2010 EDA 3501. Cooke has complied with the first three requirements for appellate review, as his appeal was timely, he raised the

issue in a post-sentence motion,² and his appellate brief contains a Rule 2119(f) statement. With respect to the fourth requirement, a substantial question exists “only when the appellant advances a colorable argument that the sentencing judge's actions were either inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process.” *Sierra*, 752 A.2d at 912-13. The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. *Commonwealth v. Griffin*, ___ A.3d ___, 2013 WL 1313089, at *2 (Pa. Super. April 2, 2013).

In his Rule 2119(f) statement, Cooke contends that Judge Ceisler failed to consider all of the relevant sentencing criteria under 42 Pa. C.S.A. § 9721(b)³ when imposing sentence.⁴ “Specifically, the sentence imposed

² In its appellate brief, the Commonwealth claims that Cooke waived his claim because no post-sentence motion appears in the certified record on appeal. Commonwealth’s Brief at 6. The certified record has, however, been supplemented to include Cooke’s Petition to Vacate and Reconsider, in which Cooke raises the issue now presented on appeal.

³ 42 Pa. C.S.A. § 9721(b) provides in relevant part: “In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” 42 Pa. C.S.A. § 9721(b).

⁴ In his Statement of Questions Presented in his appellate brief, Cooke also states that the sentence imposed was not the “least stringent one adequate to protect the community and to serve the individual needs of [Cooke].” Cooke’s Brief at 3. In *Commonwealth v. Walls*, 592 Pa. 557, 926 A.2d 957 (2007), our Supreme Court indicated that “under the current Sentencing

does not meet [Cooke's] rehabilitative needs." Cooke's Brief at 7-8. Cooke argues that his failures were "not for want of trying" but rather only as a result of his drug addiction. *Id.* at 8. In this case, because Cooke has alleged that Judge Ceisler's actions were inconsistent with a specific provision of the Sentencing Code, we conclude that he has raised a substantial question for our consideration. ***Commonwealth v. Mouzon***, 571 Pa. 419, 434, 812 A.2d 617, 627 (2002) (plurality).

A review of the certified record on appeal, however, reflects that Judge Ceisler did consider Cooke's rehabilitative needs when imposing sentence. After listening to testimony from Cooke, his attorney, and his probation officer regarding his drug addiction, Judge Ceisler recommended that Cooke serve his sentence at SCI-Chester, a correctional facility specifically designed to assist inmates with addiction issues. N.T., 12/1/12, at 4-17. In the event that Cooke could not be placed at SCI-Chester, Judge Ceisler recommended that he receive drug and alcohol treatment during his time in state prison. *Id.* at 18. Judge Ceisler also encouraged Cooke to address his addictions, noting that he seems like an intelligent man who "could really do something good" with his life if he could stay off drugs. *Id.* at 17. For these reasons,

Code there is no requirement that a sentencing court's imposition of sentence must be the minimum possible confinement" consistent with the factors in 42 Pa. C.S.A. § 9721(b). *Id.* at 571, 926 A.2d at 965. Accordingly, Cooke's argument in this regard has no merit.

we find no merit to Cooke's claim that Judge Ceisler failed to take his rehabilitative needs into consideration when imposing sentence.

We turn to Cooke's appeal of Judge Covington's sentence at docket number 2010 EDA 3437. Again, Cooke has complied with the first three requirements for appellate review, as his appeal was timely, he raised the issue in a post-sentence motion, and his appellate brief contains a Rule 2119(f) statement. In his Rule 2119(f) statement, Cooke contends that Judge Covington did not comply with the prerequisites of section 9771(c) of the Sentencing Code, and thus he has adequately set forth a substantial question for our review. ***Commonwealth v. Ahmad***, 961 A.2d 884, 887 (Pa. Super. 2008).

In Pennsylvania, once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist in accordance with Section 9771(c) of the Sentencing Code:

- (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.

42 Pa. C.S.A. § 9771(c).

Cooke contends that Judge Covington should not have imposed a sentence of total confinement in this case because nothing in the record

indicates that he will commit another crime if he is not imprisoned, and that a sentence of total confinement was not necessary to vindicate the authority of the court. Cooke's Brief at 10. As Judge Covington correctly pointed out in her Rule 1925(a) written opinion, however, Cooke committed several crimes while on house arrest, including the use and possession of cocaine on multiple occasions. Trial Court Opinion, 9/26/12, at 5. While on house arrest, Cooke tested positive for cocaine on five occasions, and refused to take the tests on two other occasions.

In ***Commonwealth v. Cappellini***, 690 A.2d 1220 (Pa. Super. 1997), this Court, when faced with the same issue under section 9771(c), stated that, "it is likely appellant did in fact commit another crime during his probation as the trial court found that he admitted to using cocaine during probation and he tested positive for cocaine and heroin during probation. Possession of cocaine and heroin, controlled substances, are misdemeanors." ***Id.*** at 1225. Accordingly, this Court concluded that "continued drug use, combined with his resistance to treatment and supervision, is enough to make a determination that, unless incarcerated, appellant would in all likelihood commit another crime." ***Id.***; ***Commonwealth v. Ferguson***, 893 A.2d 735, 739 (Pa. Super. 2006) (trial court did not abuse its discretion in imposing a sentence of total confinement under section 9771(c) given its skepticism that the defendant would be able to complete drug treatment and not re-offend).

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We likewise agree with Judge Covington that a sentence of total confinement was necessary to vindicate the authority of the court. For two serious crimes of burglary, Cooke received mild sentences, including work release and house arrest. Both approaches proved entirely ineffective, as Cooke committed a second burglary while on work release, and then repeatedly violated the terms of his house arrest. We thus have no basis on which to disagree with Judge Covington's determination that Cooke's lack of response to reasonable efforts at rehabilitation demanded a period of incarceration to vindicate the authority of the court. Trial Court Opinion, 9/26/12, at 5-6.

Judgments of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 5/29/2013