NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEVIN EUGENE VARNER, A/K/A KEVIN EUGENE WEYANT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 375 WDA 2012

Appeal from the Order Entered February 8, 2012
In the Court of Common Pleas of Bedford County
Criminal Division at No(s): CP-05-CR-0000421-2001

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.: Filed: February 21, 2013

Kevin Eugene Varner, a/k/a Kevin Eugene Weyant appeals from the February 8, 2012 order anticipatorily revoking his probation and sentencing him to five to ten years imprisonment. We affirm.

Appellant was charged with aggravated assault, two counts of simple assault, terroristic threats, reckless endangerment, and harassment in connection with an incident of domestic violence that occurred on August 16, 2001. On December 13, 2001, he tendered a negotiated guilty plea to one count of aggravated assault graded as a first degree felony and one count of simple assault graded as a first degree misdemeanor, and, in exchange, the Commonwealth withdrew all the remaining charges and assented to

imposition of a sentence of five to ten years imprisonment plus a consecutive probationary term.

As they are unnecessary to resolve the issues on appeal, the notes of testimony of the plea colloquy were not transcribed. We therefore have discerned the facts of the crime from the allegations in the criminal complaint. On the day in question, Appellant punched his four-year-old son in the face. Additionally, Appellant beat his wife by striking her repeatedly in the head with a closed fist. He then choked her with his hands and placed a pillow over her face and pressed it down. While choking her, Appellant said to the victim, "I'm gonna kill you! Say your prayers! Make peace with God!," and, as he was pushing the pillow into her face, he stated, "It's time to go to sleep." Police Criminal Complaint, 8/22/01, at 2.

On February 12, 2002, Appellant was sentenced in accordance with the terms of the agreement to five to ten years incarceration followed by ten years on special probation, which is to be supervised by the Pennsylvania Board of Probation and Parole (the "Board"). Prior to expiration of his term of imprisonment, on March 24, 2011, Appellant was paroled from state prison to Renewal, Inc., a specialized community corrections residence with a violence prevention program. He was ordered to enter into and actively participate in the community corrections residency until successfully discharged.

Rather than complete the program, sixteen days later, on April 9, 2011, Appellant absconded from that facility. He was not apprehended until May 23, 2011, in Bedford County, over 100 miles away from Renewal, Inc. Appellant's parole was revoked, and he was re-committed to serve his parole back time. His sentence was set to expire on October 5, 2011.

On September 23, 2011, the Commonwealth filed a petition asking the court to anticipatorily revoke the probationary sentence that Appellant was set to begin serving on October 5, 2011. The ***Gagnon I*** hearing was held on September 29, 2011, when Appellant was informed that the basis for the request for revocation of the probation, was his "absconding from treatment and failing to report to the Parole Office[.]" N.T. ***Gagnon I***, 9/29/11, at 2. The court concluded that there was a *prima facie* case warranting probation revocation, issued a detainer ordering that Appellant be sent to Bedford County Jail after expiration of his state sentence, and scheduled a ***Gagnon II*** hearing.

At the October 27, 2011 ***Gagnon II*** hearing, Appellant was accused of leaving the district without permission, changing his residence without permission, failing to complete the Renewal, Inc. program, and failing to report to his parole officer as instructed. Appellant stipulated to committing these actions. These violations all stem from his flight from the Renewal, Inc. facility on April 9, 2011, without successfully completing that program as well as his ensuing failure to report immediately to his parole officer that

he was leaving that facility without completing the program, as he was required to do as a condition of parole. The Commonwealth established that the parole office placed a missing person request on Appellant the day he fled from the facility and "through tips and fieldwork," the parole office "was led to him in the Altoona area," where he was arrested on May 23, 2011. N.T. ***Gagnon II***, 10/27/11, at 20. The Commonwealth also established that Appellant had engaged in serious misconduct in prison. Specifically, he was found guilty of threatening a prison guard, threatening another inmate, and forcing an inmate to perform oral sex on him. He was placed on the prison's sexual predator's list. ***Id***. at 42-44. The Commonwealth's position was that this behavior demonstrated that Appellant was not amenable to rehabilitation through probation.

The trial court revoked Appellant's probation and ordered a pre-sentence report. Sentencing occurred on January 12, 2012. At that time, Appellant was sentenced to five to ten years imprisonment and informed that he had ten days to file a post-sentence motion and thirty days to file an appeal. Appellant filed a timely post-sentence motion for reconsideration of sentence, and at the February 8, 2011 hearing, where that motion was denied, was informed that he still had the right to appeal his sentence.

Appellant thereafter filed this appeal from the order denying reconsideration of his sentence.[1] He raises these contentions:

1. Whether the court erred when it anticipatorily revoked Defendant's probation based upon a technical violation of Appellant's parole?

2. Whether the court erred when it resentenced Appellant on the anticipatory probation revocation to a period of incarceration of not less than five (5) years nor more than ten (10) years in a state correctional facility based upon a technical violation of Appellant's parole?

3. Whether the court erred when it sentenced Appellant to an excessive period of incarceration of not less than five (5) years nor more than ten (10) years in a state correctional facility based upon a technical violation of Appellant's parole?

4. Whether the court erred when it sentenced Appellant to an excessive period of incarceration of not less than five (5) years nor more than ten (10) years in a state correctional facility based upon a technical violation of Appellant's parole when Appellant served the maximum term of imprisonment imposed upon him in connection with the underlying offense?

Appellant's brief at 7-8.

When we review an "an appeal from a judgment of sentence imposed after the revocation of probation, this Court's scope of review includes the

---

[1] We note that a motion for reconsideration of sentence in the probation revocation setting does not toll the time period for taking an appeal. ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 790-94 (Pa.Super. 2001). However, if a defendant is improperly led to believe that he can appeal after denial of his post-sentence motion, we will not quash the appeal as untimely and, instead, construe the misinformation about the appeal period as a breakdown in the court's operation. Since the information given by the court to Appellant would leave the impression that he could file a post-sentence motion and then an appeal following its denial, we decline to quash this appeal as untimely. ***Id***.

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). The sentence imposed following revocation of a probationary 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). Probation can be revoked "despite the fact that, at the time of revocation of probation, [the defendant] had not yet begun to serve the probationary portion" and even if the behavior leading to revocation occurred prior to the inception of the probationary term. ***Commonwealth v. Ware***, 737 A.2d 251, 253 (Pa.Super. 1999).

Appellant's first contention relates to the fact that his probation was revoked based upon violations of the terms of parole. He contends that his probation should not have been revoked based upon conditions that were not placed on his probationary term by the trial court. ***See Commonwealth v. MacGregor***, 912 A.2d 315 (Pa.Super. 2006) (probationary sentence improperly revoked due to defendant's violation of a condition of probation promulgated by the probation and parole board or probation agent; condition must be imposed by trial court); ***Commonwealth v. Vilsaint***, 893 A.2d 753, 757 (Pa.Super. 2006) ("[T]he legislature . . . specifically empowered the court, not the probation offices

and not any individual probation officers, to impose the terms of probation.").

Initially, we must observe that our Supreme Court in ***Commonwealth v. Elliott***, 50 A.3d 1284 (Pa. 2012), has negated the approach of the ***MacGregor*** and ***Vilsaint*** decisions. In ***Elliott***, the defendant pled guilty to offenses involving the sexual assault of children, was adjudicated as a Sexually Violent Predator, and was sentenced to jail followed by a probationary term. The court imposed these conditions upon the probation: registration under Megan's Law, the defendant was to have no direct or indirect contact with the victims, and the defendant was to have no unsupervised contact with a minor child. The defendant's probation was revoked based on his violation of special conditions for probation placed on sex offenders by the Board. Specifically, after serving his term of incarceration, the defendant was released and was subject to twenty-five conditions of probation imposed by the Board. Some conditions were significantly more restrictive as to the defendant's ability to interact with children and mandated that he not have any contact whatsoever with anyone under eighteen and not loiter within 1,000 feet of locations where children normally gather, including parks and schools.

After beginning his probation, the defendant's probation officer saw the defendant loitering within 1,000 feet of where children were gathered in a park. The parole officer confronted the defendant, who admitted that he

watched the children in the park and was aroused by one of the young girls. The officer arrested the defendant for violating his probation based upon this occurrence and discovered in the defendant's residence a journal documenting defendant's observations of the girl. The trial court thereafter revoked the defendant's probation for violating the two noted restrictions imposed upon his movements by the Board. On appeal, we reversed, applying the reasoning of ***MacGregor*** and ***Vilsaint***, but our Supreme Court reversed us.

It conducted an "inquiry concerning whether the Board, county probation offices, or the agents and officers thereof, can impose conditions upon probationers that are not explicitly delineated in a trial court's sentencing and probation order." ***Elliott***, at 1289. The court noted that under the Sentencing Code, the trial court is tasked with setting the terms and conditions for probation within delineated parameters. Specifically, 42 Pa.C.S. § 9754 states that:

> **(a) General rule.**—In imposing an order of probation the court shall specify at the time of sentencing the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision.
>
> **(b) Conditions generally.**—The court shall attach such of the reasonable conditions authorized by subsection (c) of this section as it deems necessary to insure or assist the defendant in leading a law-abiding life.

Subsection (c) lists various conditions a sentencing court may impose upon a defendant. On the other hand, the Prisons and Parole Code also accords the Board the power to impose "conditions of supervision" upon any person under its jurisdiction. ***See e.g.*** 61 Pa.C.S. § 6151 (defining conditions of supervision as "any terms or conditions of the offender's supervision, whether imposed by the court, the board or an agent, including compliance with all requirements of Federal, State and local law.").

The Supreme Court construed these two statutes harmoniously. It held that, in light of the sentencing authority accorded the courts in the Sentencing Code, "the Board and its agents cannot impose any condition of supervision it wishes, *carte blanche.* This would, of course, interfere with a court's well-established sentencing authority." ***Elliott, supra*** at 1291. However, the Court also rejected the notion that the Board had no power to impose any conditions on supervision. It therefore held that the "the Board and its agents may impose conditions of supervision that are germane to, elaborate on, or interpret any conditions of probation that are imposed by the trial court." ***Id***. at 1292. It summarized its holding as follows: "a trial court may impose conditions of probation in a generalized manner, and the Board or its agents may impose more specific conditions of supervision pertaining to that probation, so long as those supervision conditions are in furtherance of the trial court's conditions of probation." ***Id***.

More recently, we upheld revocation of probation based upon the defendant's refusal, following his release from prison, to execute a document created by his probation office that outlined the terms and conditions of his probation. ***Commonwealth v. Allshouse***, 33 A.3d 31 (Pa.Super. 2011). Relying upon ***MacGregor*** and ***Vilsaint***, the defendant argued that since the trial court had not ordered that he sign the document as part of the probationary sentence, his refusal to do so could not be a basis for revocation. We concluded that probation was revoked based on the defendant's unwillingness to cooperate with the probation office and noted that the defendant had committed criminal acts while incarcerated that were sufficient to warrant revocation. We therefore upheld the revocation decision.

Herein, while the conditions of parole at issue were not specifically placed on Appellant for purposes of his probationary sentence, they undoubtedly were in furtherance of the rehabilitation goal that probation is intended to achieve. Moreover, Appellant's probation was expressly made subject to supervision by the Board, which promulgated the parole restrictions. Appellant was told to successfully complete a program designed to curb his underlying criminal behavior and to report to his parole officer if he left the facility without achieving that goal. Instead, he left after sixteen days and fled the jurisdiction. He absconded from supervision for a significant period without informing his parole officer of his whereabouts,

and he was discovered only through the use of investigatory resources. As in the ***Allshouse*** case, Appellant's violations of his parole conditions demonstrated an inability to cooperate with the very officials tasked with helping him to rehabilitate himself. Also significant is that in prison, Appellant threatened a prison official, threatened a fellow inmate, and performed actions constituting involuntary deviate sexual intercourse ("IDSI"). Thus, we uphold the trial court's decision to revoke probation under the reasoning outlined in ***Allshouse***. ***See also Commonwealth v. Simmons***, 2012 PA Super 262.

Additionally, the ***MacGregor*** and ***Vilsaint*** cases are not applicable in the present matter. They involve the question of whether a probation violation can be sustained based upon terms and conditions of probation outlined by a probation office or officer instead of a court. Appellant's probation was not revoked based upon his violation of any of its terms and conditions; rather, revocation flowed from his behavior while in prison and on parole. This behavior demonstrated that probation would not be an effective tool for rehabilitation. Our Supreme Court has articulated that a probation violation is present whenever the Commonwealth demonstrates that the defendant's conduct has shown that probation will be an "ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct." ***Commonwealth v. Infante***, 888 A.2d 783, 791 (Pa. 2005) (citation omitted).

In this case, Appellant engaged in conduct that would be considered criminal offenses, if prosecuted, during the course of his imprisonment, failed to complete a program designed to help him avoid criminal behavior,[2] did not report to his parole officer as required by the conditions of his parole, and fled the jurisdiction. He did not voluntarily report to his parole officer for a significant period and was apprehended solely through investigative efforts by his parole officer. These activities demonstrate that probation will not be an effective vehicle.

At this juncture, we repeat the observation that probation can be revoked based on behavior exhibited prior to the commencement of probation. ***Commonwealth v. Hoover***, 909 A.2d 321, 323 (Pa.Super. 2006) (In "***Commonwealth v. Wendowski***, 278 Pa.Super. 453, 420 A.2d 628 (1980), . . . we held that a defendant's probationary sentence could be revoked prior to commencement of such sentence if his conduct after the probationary sentence was imposed, but before it began, warranted such revocation."). We therefore conclude that the court did not abuse its discretion in revoking Appellant's probation based upon his behavior in prison and on parole.

---

[2] While Appellant offered some excuse as to why he left Renewal, Inc., he never explained why he went to Bedford County rather than report to his parole officer, as required by the Board.

Appellant's next averment is that his sentence of total confinement was improper under 42 Pa.C.S. § 9771(c),

> **(c) Limitation on sentence of total confinement.--** The court shall not impose a sentence of total confinement upon revocation unless it finds that:
>
> 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 this court.

Appellant maintains that he committed only technical violations of probation that do not fall within the parameters of any of the three exceptions outlined in § 9771(c). We disagree. Appellant committed actions that constitute crimes during the term of his incarceration. Soon after being released on parole, he fled and was found weeks later more than 100 miles from the facility where he was ordered to reside. This behavior demonstrates that it is likely that he will commit another crime if he is not imprisoned, and the sentence of total confinement was authorized pursuant to § 9771(c)(2).

Appellant's final two positions are identical and repetitive. He argues that the five-to-ten-year term was excessive, and total confinement was not warranted under § 9771(c). We already have rejected the second allegation and now examine whether the sentence should be considered excessive. This position relates to the discretionary aspects of the sentence imposed.

Before we are permitted to examine the merits of a contention relating to the discretionary aspects of a sentence, the issue must be properly preserved, the defendant's brief must contain a statement of reasons for allowance of appeal from the discretionary aspects of that sentence, and that statement must demonstrate the existence of a substantial question. ***See Commonwealth v. Lewis***, 45 A.3d 405 (Pa.Super. 2012). Preservation exists in this matter, and the brief contains the appropriate statement. Finally, the issue raises a substantial question. ***See Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa.Super. 2010). Accordingly, we can address the merits of his challenge to the discretionary aspects of the sentence imposed.

In this connection, we note that the "the length of incarceration rests peculiarly within the discretion of the [violation-of-probation] judge." ***Commonwealth v. Reaves***, 923 A.2d 1119, 1131 n.12 (Pa. 2007). Herein, Appellant complains that the trial court did not take into account that he served the complete sentence originally imposed and that the offenses in question occurred eleven years prior to revocation. However, Appellant ignores that, while imprisoned, he engaged in criminal conduct, including IDSI, and that he demonstrated an unwillingness to conform to supervision by the Board, which was in charge of Appellant's special probation. In light of the aggravating circumstances at issue, we cannot conclude that the court abused its discretion in imposing a five-to-ten-year term of imprisonment.

Order affirmed.