NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN MARCHETTI, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 513 EDA 2012

Appeal from the Judgment of Sentence entered January 9, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0002320-2007

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN MARCHETTI, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 683 EDA 2012

Appeal from the Judgment of Sentence entered January 9, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0006617-2007

BEFORE: DONOHUE, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J: Filed: January 10, 2013

In this consolidated matter, Appellant, John Marchetti, appeals from the judgment of sentence entered January 9, 2012, sentencing him to an aggregate 18 to 36 months' incarceration and two years' probation for violations of probation. We affirm.

*Former Justice assigned to the Superior Court.

The trial court briefly summarized the relevant factual and procedural history of this matter as follows:

> [Appellant] was convicted at No. 2320-07 of driving under the influence and reckless endangerment and at No. 6617-07 of sexual abuse of children. On March 29, 2011, he was arrested and charged with violating his terms of probation at both caption numbers. The [trial court] held hearings on May 10, 2011 and July 19, 2011 and found [Appellant] in violation of probation on January 9, 2012. [The trial court] sentenced [Appellant] to 18-36 months in a state correctional facility at No. 6617-07 and a consecutive term of two years probation at No. 2320-07.
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> On January 17, 2012, [Appellant] filed a motion for reconsideration of his sentence. On February 7, 2012, while his motion for reconsideration was pending, [Appellant] filed a timely notice of appeal to the Superior Court. Subsequently, the [trial court] denied Appellant's motion for reconsideration as moot under Pa.R.Crim.P. 708 due to the filing of his appeal.[]

Trial Court Opinion, 6/13/2012, at 1-2.

Appellant raises one issue for our consideration on appeal:

> Whether the [trial] court erred in allowing the admission of certain testimony by [Appellant's] probation officer at the Gagnon II hearing held on May 10, 2011 regarding prior conduct of [Appellant] which served as the basis for finding him in violation of his sentence at a previous Gagnon proceeding, since such testimony was immaterial and irrelevant with respect to the alleged violations asserted this time.

Appellant's Brief at 7.[1]

Appellant's appeal argues that the trial court abused its discretion in admitting certain testimony from Appellant's probation officer, John

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[1] The requirements of Pennsylvania Rule of Appellate Procedure 1925 have been satisfied in this matter.

Firestone, at his ***Gagnon II*** hearing.[2] Prior to addressing the merits of that claim, however, we consider whether Appellant's unspecific Rule 1925 statement, and unspecific question presented, waived appellate review in this case. Indeed, in its Rule 1925 opinion, rather than address the merits of Appellant's evidentiary claim, the trial court suggests that the issue is waived because Appellant's concise statement fails to specify what portion of Officer Firestone's testimony was improperly admitted. Trial Court Opinion, 6/13/2012, at 3. The trial court points out that Officer Firestone's testimony takes up 30 pages of the ***Gagnon II*** hearing transcript, but Appellant's concise statement fails to specify which portion of that testimony concerns "prior conduct," the admission of which Appellant argues resulted in an abuse of discretion. Finding Appellant's concise statement "simply too vague," the trial court suggests that appellate review of the issue is waived. ***Id.***

We agree with the trial court that, pursuant to Rule 1925 and applicable precedent, where an Appellant fails to set forth a concise statement that is specific enough to provide the trial court and the appellate court with the opportunity for meaningful review of the issue, our court may find waiver. Pa.R.A.P. 1925; ***see e.g. Commonwealth v. Gibbs***, 981 A.2d

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[2] ***See Gagnon v. Scarpelli***, 411 U.S. 778, 782 (1973) (due process requires that a probationer be given a preliminary (***Gagnon I***) and a final (***Gagnon II***) hearing prior to revoking probation).

274, 281 (Pa. Super. 2009). However, not all vague concise statements require a finding of waiver. For example, in ***Commonwealth v. Laboy***, 936 A.2d 1058, 1060 (Pa. 2007), the Pennsylvania Supreme Court reversed our Court's finding of waiver based upon an unspecific Rule 1925 statement where, while the Rule 1925 statement was indeed, unspecific, the convictions under consideration and the claims presented in the appeal were "relatively straightforward" matters upon which the trial court provided significant analysis.

Though the transcript of Officer Firestone's testimony spans 30 pages, Appellant's brief specifically cites and indeed quotes the objected to portion of testimony, the admission of which presents a relatively straightforward issue on appeal. Appellant's Brief at 11-12. Moreover, the trial court addressed the admissibility of the objected-to testimony on the record at the ***Gagnon II*** hearing, and briefly in its Rule 1925(a) opinion, in the alternative to waiver. N.T. 5/10/2011, at 96-97; Trial Court Opinion, 6/13/2012, at 3. Consequently, despite his vague Rule 1925 statement and question presented, we are able to narrow down the issue presented on appeal by Appellant, and do not find the issue waived.

Appellant challenges the admission of certain evidence at his ***Gagnon II*** hearing wherein the trial court revoked Appellant's probation on both criminal caption numbers. Initially, we note that:

> [p]robation, like parole, is not part of the criminal prosecution, and thus the full panoply of rights due a defendant in a criminal trial does not apply to probation revocation. Probation is a

> suspended sentence of incarceration served upon such terms and conditions as imposed by the sentencing court. Probation revocation requires a truncated hearing by the sentencing court to determine whether probation remains rehabilitative and continues to deter future antisocial conduct. Such a hearing takes place without a jury, with a lower burden of proof, and with fewer due process protections. Conversely, the criminal trial, the culmination of the criminal prosecution, is a bastion of constitutional protections, fortified with procedural and substantive due process.

Commonwealth v. Holder, 805 A.2d 499, 503-504 (Pa. Super. 2002). Furthermore, pursuant to 42 Pa.C.S.A. § 9771:

> The court may revoke an order of probation upon proof of the violation of specified conditions of the probation. Upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation.

42 Pa.C.S.A. § 9771(b).

Appellant challenges the admission of certain evidence offered by the Commonwealth in support of probation revocation. The admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. ***Commonwealth v. Lilliock***, 740 A.2d 237, 234 (Pa. Super. 1999). Further, an erroneous ruling by a trial court on an evidentiary issue does not require us to grant relief where the error is harmless. ***Commonwealth v. Mitchell***, 839 A.2d 202, 214 (Pa. 2003).

> An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict. If there is a reasonable possibility that the error may have contributed to the verdict, it

> is not harmless. In reaching that conclusion, the reviewing court will find an error harmless where the uncontradicted evidence of guilt is overwhelming, so that by comparison the error is insignificant. The burden of establishing that the error was harmless rests upon the Commonwealth.

Id. at 214-215 (citations omitted).

In this matter, one of Appellant's probation violations was his failure to complete court-ordered sex offender treatment. Appellant's failure to complete that treatment, however, was not the first time that he failed a sex offender program. At his ***Gagnon II*** hearing, Appellant's probation officer referenced his incomplete earlier treatment. Specifically, the testimony occurred as follows:

> Commonwealth:
>
> Q: Mr. Firestone were you aware that [Appellant] had undergone treatment at the treatment provider?
>
> A: Yes he was discharged from Redding Specialist back in 2009.
>
> Q: So this is the second treatment?
>
> A: That is correct.
>
> Q: And was he violating when he was discharged from Redding Specialist back in 2009?
>
> A: Yes he was.
>
> Appellant [proceeding *pro se*]:
>
> > Objection your honor. This is going to breach a double jeopardy issue. I had a gag hearing regarding that and was punished or things were dismissed and there may be a double jeopardy issue if the [trial court] considers it based for this violation.
>
> Trial Court:

> Overruled. Your course of supervision is relevant. The successes and failures that you have had in working with Adult Probation and Parole.

N.T., 5/10/2011, at 96-97.

On appeal, Appellant claims that the above testimony was irrelevant and had little bearing on whether he willfully refused to attend programs "this time around." Appellant's Brief at 12. According to Appellant, "[u]ltimately, the court found [him] to be in violation of his probation primarily because he again was unable to complete his court ordered treatment." ***Id.*** Therefore, Appellant argues that admission of the above quoted testimony resulted in an abuse of discretion and reversible error. ***Id.*** at 13.

The record, however, belies Appellant's claim. As the trial court recognized, Appellant's history of compliance/non-compliance with supervision would be directly relevant to whether probation continued to be a viable rehabilitative option to deter future anti-social conduct and whether total confinement was necessary to vindicate the authority of the court. Moreover, the overwhelming evidence presented at Appellant's ***Gagnon II*** hearing established multiple technical violations of Appellant's probation, having nothing to do with Appellant's previously failed sex offender treatment program. Indeed, testimony at the ***Gagnon II*** hearing establish that Appellant failed to complete the most recent sex offender program, violated a restraining order, improperly used the internet without monitoring software, and improperly communicated with his son, all in violation of his

probation. Trial Court Opinion, 6/13/2012, at 3. Therefore, we disagree with Appellant's characterization that the objected to testimony served as the trial court's basis for finding him in violation of probation. To the contrary, even if admission of the objected to testimony was in error (which we do not believe that it was), we are confident that it was harmless error that did not influence the trial court's finding that Appellant violated his probations; there was substantial other evidence establishing multiple violations. Appellant's issue on appeal is without merit.

Judgment of sentence affirmed.