

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

EDWARD SMITH

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 7 EDA 2012

Appeal from the Judgment of Sentence November 3, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0310871-2006

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

EDWARD SMITH

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 8 EDA 2012

Appeal from the Judgment of Sentence November 3, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001203-2010

BEFORE: PANELLA, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J.

FILED MAY 17, 2013

Appellant, Edward Smith, appeals from the judgment of sentence entered November 3, 2011, by the Honorable Chris R. Wogan, Court of Common Pleas of Philadelphia County, following the revocation of Smith's probation. We affirm.

* Retired Senior Judge assigned to the Superior Court.

On December 18, 2007, Smith entered a guilty plea to criminal conspiracy to deliver heroin at docket number CP-51-CR-0310871-06, and was sentenced to three to twenty-three months' imprisonment to be followed by two years' probation. On October 21, 2010, Smith was convicted of cruelty to animals, for which no further sentence was imposed. Subsequent thereto, on April 8, 2010, Smith entered a guilty plea to possession of a controlled substance at docket number CP-51-CR-0001203-10. As a result, the lower court revoked Smith's probation and resentenced Smith to an aggregate term of forty-two months' reporting probation on both cases.

Smith was arrested yet again on August 10, 2010, and on December 7, 2010, entered a guilty plea to disorderly conduct. Thereafter, Smith failed to report to probation on August 26, 2010 and September 3, 2010. Smith was taken into custody on September 9, 2010, and a violation of probation hearing was conducted on January 19, 2011. Following the hearing, the trial court revoked Smith's probation at docket numbers CP-51-CR-0310871-06 and CP-51-CR-0001203-10 and sentenced Smith to an aggregate term of 5 ½ to 11 months' incarceration plus 5 ½ years' concurrent probation. The trial court additionally required Smith attend anger management treatment and undergo drug screening.

Over the following months, Smith committed numerous violations of his probationary sentence, including testing positive for PCP and arriving late for probation appointments. Following a revocation hearing on November 3,

2011, the trial court again revoked Smith's probation for conspiracy to deliver heroin and possession of a controlled substance.¹ Thereafter, the court resentenced Smith to an aggregate term of 1 ½ to three years' incarceration to be followed by 42 months' probation. On November 8, 2011, Smith filed a *pro se* Motion for Reconsideration of Sentence, and on November 21, 2011, defense counsel filed a "Petition to Vacate and Reconsider Nunc Pro Tunc." The trial court denied counsel's petition on December 1, 2011. This timely appeal followed.

Smith raises the following issue for our review:

Did not the court below abuse its discretion in sentencing appellant to a term of eighteen to thirty-six months of total confinement for a technical violation of probation, where appellant had not been convicted of another crime, his conduct did not indicate that he was likely to commit another crime, and the sentence was not essential to vindicate the authority of the court; where the court failed to take into account the sentencing factors enumerated in the Sentencing Code and to give sufficient individualized consideration to appellant's background and rehabilitative needs; and where the sentence imposed was manifestly excessive?

Appellant's Brief, at 3. This claim challenges the discretionary aspects of Smith's sentence.

Preliminarily, we must determine whether Smith has the right to seek permission to appeal the court's exercise of its discretion. **See *Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010). When an

¹ Smith's sentence for disorderly conduct had expired.

appellant challenges the discretionary aspects of his sentence, we utilize a four-part test 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.CON.S.TAT.ANN. § 9781(b).

Id. (internal citations omitted).

Pursuant to our decision in ***Moury*** and Pa.R.Crim.P. 708(D), Smith had ten days from the imposition of sentence after revocation to file a post-sentence motion in order to preserve his challenge to the discretionary aspects of his sentence. Defense counsel did not file his Petition to Vacate and Reconsider Nunc Pro Tunc until November 21, 2011 – eight days beyond the deadline to file a post-sentence motion from the November 3, 2011, sentencing order; nor did he object at sentencing. Although Smith filed a timely *pro se* Motion for Reconsideration on November 8, 2011, this Court is prohibited from reviewing *pro se* filings of a counseled appellant. ***See*** Pa.R.A.P. 3304; ***see also Commonwealth v. Nischan***, 928 A.2d 349, 355 (Pa. Super. 2007) (noting that an appellant's *pro se* filings while represented by counsel were a "nullity"), ***appeal denied***, 594 Pa. 704, 936 A.2d 40 (2007). Accordingly, Smith's *pro se* filings failed to preserve his challenge to the discretionary aspects of his sentence.

Smith argues that we should not find waiver in this case, and likens his untimely motion for reconsideration *nunc pro tunc* to an untimely Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). The amended procedures under Rule 1925 now require, in pertinent part:

(3) If an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been per se ineffective, the appellate court shall remand for the filing of a Statement *nunc pro tunc* and for the preparation and filing of an opinion by the judge.

Pa.R.A.P., Rule 1925(c)(3), 42 PA.CON.S.STAT.ANN.

Unlike the exception for remand provided by our rules of appellate procedure in cases involving an untimely Rule 1925(b) statement, there exists no exception when an appellant fails to file a timely post-sentence motion to preserve a sentencing claim. Our rules of criminal procedure unequivocally state that a “motion to modify a sentence imposed after a revocation shall be filed within 10 days of the date of imposition.” Pa.R.Crim.P. 708(E). In this case, the motion for reconsideration *nunc pro tunc*, which the trial court denied, was filed eight days beyond that deadline. Accordingly, we are constrained to find Smith has waived his challenge to the discretionary aspects of his sentence on appeal.

Judgment of sentence affirmed.

Olson, J., concurs in the result.

J-S24008-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/17/2013