NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BRIAN MOUZONE,	:	
	:	
Appellant	:	No. 708 EDA 2012

Appeal from the Judgment of Sentence entered January 27, 2012 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No(s): CP-51-CR-0002206-2010, CP-51-CR-0004854-2010, and CP-51-CR-1006651-2004.

BEFORE: LAZARUS, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: February 27, 2013

Brian Mouzone (Appellant) appeals from the aggregate judgment of sentence of three and one-half to seven years' incarceration, followed by three years' probation, entered on January 27, 2012, following the revocation of his previous probation sentence. We affirm.

The trial court summarized the relevant facts as follows:

> On November 30, 2004 [Appellant] pled guilty to one count of retail theft. He was sentenced to 3 to 23 months [of] county incarceration to be followed by one year of reporting probation with parole to a [Forensic Intensive Recovery] program when a bed was available. [The trial c]ourt ordered him to successfully complete drug treatment, to pay fines and costs and to seek and maintain employment.
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> [Appellant] completed Luzerne Treatment Center, but by March 15, 2006, he had absconded from supervision and wanted cards were issued. On April 17, 2007, [Appellant] was arrested and charged with knowing and intentional possession of a controlled substance, which was withdrawn on August 22, 2007.

* Retired Senior Judge assigned to the Superior Court.

On August 23, 2007, [the trial c]ourt conducted a violation hearing. [Appellant] was found to be in technical violation for absconding and not completing outpatient treatment and as a result [the trial c]ourt revoked his probation. [The trial c]ourt sentenced him to 11 ½ to 23 months in county custody, plus three years reporting probation, with credit for time served. [Appellant] was ordered to complete 90 days in Options, a county drug treatment program, after which he would be work-release eligible. Additionally, [the trial c]ourt ordered [Appellant] to enroll in and complete a vocational training program, to earn his GED and to obtain a job.

Subsequently, [Appellant] was arrested and charged with two counts of retail theft to which he pled guilty on May 27, 2010. Pursuant to his negotiated plea, [Appellant] was sentenced to one year in the Intermediate Punishment Program (IP), which included outpatient treatment at Parkside and 6 months under house arrest, to be followed by two years of reporting probation. [The trial c]ourt ordered [Appellant] to perform 40 hours of community service, earn his GED, undergo random urinalysis, obtain job training, complete drug treatment and to pay fines and costs.

That same day [the trial c]ourt conducted a violation hearing. [Appellant] was found to be in direct violation based upon his new retail theft convictions, and as a result, [the trial c]ourt revoked his probation. [The trial c]ourt sentenced him to the same sentence as on the two counts of retail theft to which he pled guilty to an intermediate punishment and probationary sentence. [The trial c]ourt instructed [Appellant] that he was being given another chance, but if he were to return before [the trial c]ourt with another violation, that he would be sent to state prison.

In April, 2011, [Appellant] absconded from supervision and failed to appear for a status conference on May 27, 2011. [The trial c]ourt issued a bench warrant and wanted cards. On July, 17, 2011, [Appellant] was arrested and charged with retail theft. He appeared before [the trial c]ourt and pled guilty to this charge on January 27, 2012. In accordance with his negotiated plea, [Appellant] was sentenced to 3 to 23 months of county incarceration plus three years of probation. [The trial c]ourt also ordered [Appellant] to obtain drug and mental health treatment while in jail and upon release.

That same day, [the trial c]ourt conducted a violation hearing. First [the trial c]ourt reviewed his criminal history since his original appearance before [the trial c]ourt in 2004. Defense counsel, Ross Miller, Esquire, stated that [Appellant] had been doing well in the IP program and that [Appellant] had been working while he addressed his drug problem. Mr. Miller argued that, as a drug addict, when stressors came into [Appellant's] life, the program was not enough and [Appellant] relapsed. He recommended county incarceration and Hoffman Hall, a private jail facility.

Noël DeSantis, Esquire, on behalf of the Commonwealth, did not object to 18 months at Hoffman Hall. However, she recommended an 11 ½ to 23 month sentence followed by five years reporting probation.

[Appellant] spoke next on his own behalf. He apologized for his behavior and stated that he turned back to drugs after losing his job. He stated that he does not see his problem as "that extreme [as] to send [him] to state prison."

[The trial c]ourt found [Appellant] to be in direct violation of all prior cases, and as a result, revoked his probation. [Appellant] was sentenced to 3 ½ to 7 years['] state incarceration on the 2010 cases. He was further sentenced to three years consecutive reporting probation on the 2004 case. Both terms were to run concurrent to each other and to the county sentence to which he pled guilty on that same day, for an aggregate sentence of 3 ½ to 7 years['] state incarceration to be followed by 3 years of reporting probation. [Appellant] was ordered to get drug treatment and was not RRRI eligible due to a prior simple assault conviction. [The trial c]ourt stated that it has "bent over backwards since 2004 and [gave] him every opportunity to repeat programs." Furthermore, [the trial c]ourt stated that [Appellant] had not taken his prior violations seriously and that this sentence was absolutely necessary to help [Appellant] to hopefully get serious about his drug problem with the program in state custody.

On February 6, 2012, [Appellant] filed a Motion to Vacate and Reconsider Sentence, which was denied by operation of law on or about May 7, 2012. On February 27, 2012, [Appellant] filed a timely Notice of Appeal to [the] Superior Court. On April

> 17, 2012, upon receipt of all the notes of testimony, [the trial c]ourt ordered defense counsel [to] file a Concise Statement of Errors Complained of on Appeal [p]ursuant to Pa.R.A.P. 1925(b), no later than May 8, 2012, and defense counsel did so on May 3, 2012.

Trial Court Opinion, 7/8/2012, at 2-5 (citations and docket numbers omitted).

Appellant raises the following issue on appeal:

> Was not the sentencing court's imposition of a sentence of not less than three and one half nor more than seven years[']incarceration followed by three years' probation manifestly excessive and an abuse of discretion where the court failed to give sufficient individualized consideration to [Appellant's] positive achievements versus his violations and how this sentence was necessary to protect the community and serve [Appellant's] serious rehabilitative needs, in violation of the state and federal constitutional requirements of fundamental fairness?

Appellant's Brief at 3.

Appellant's claim challenges the discretionary aspects of his sentence.

> An appellant wishing to appeal the discretionary aspects of a probation-revocation sentence has no absolute right to do so but, rather, must petition this Court for permission to do so. Specifically, the appellant must present, as part of the appellate brief, a concise statement of the reasons relied upon for allowance of appeal. In that statement, the appellant must persuade us there exists a substantial question that the sentence is inappropriate under the sentencing code.
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> In general, an appellant may demonstrate the existence of a substantial question by advancing a colorable argument that the sentencing court's actions were inconsistent with a specific provision of the sentencing code or violated a fundamental norm of the sentencing process. While this general guideline holds true, we conduct a case-specific analysis of each appeal to decide whether the particular issues presented actually form a substantial question. Thus, we do not include or exclude any

> entire class of issues as being or not being substantial. Instead, we evaluate each claim based on the particulars of its own case.
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> * * *
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> If an appellant convinces us that a claim presents a substantial question, then we will permit the appeal and will proceed to evaluate the merits of the sentencing claim. When we do so, our standard of review is clear: Sentencing is vested in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. Moreover, an abuse of discretion is not merely an error in judgment. Instead, it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness.

Commonwealth v. Kalichak, 943 A.2d 285, 289-90 (Pa. Super. 2008) (citations omitted).[1]

Instantly, Appellant's brief contains a statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). Appellant's Brief at 6-7. In his statement, Appellant argues that his sentence is excessive as a result of the trial's court alleged failure to consider the relevant sentencing criteria enumerated in 42 Pa.C.S. § 9721(b).[2] ***Id.*** at 6. Appellant argues that his sentence

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[1] Challenges to the discretionary aspects of a sentence are waived if not raised at the sentencing proceedings or in a post-sentence motion. ***Commonwealth v. Gibbs***, 981 A.2d 274, 282-83 (Pa. Super. 2009). As noted above, Appellant challenged the discretionary aspects of his sentence in a motion to vacate and reconsider sentence. He is therefore not foreclosed from challenging the discretionary aspects of his sentence on appeal.

[2] The statute provides, in pertinent part:

> **(b) General standards.--**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

> far surpassed that required to protect the public because [Appellant] was not alleged to pose a threat to the public. The time spent in prison throughout his eight year supervision indicates that the gravity of the offense and the impact on the life of the 'victim' and on the community had already been vindicated. Lastly, [Appellant] had already begun to rehabilitate himself by completing various treatment programs and completing his community service and job training.

Id. Appellant also contends that the trial court erred by imposing a sentence of total confinement, generally. ***Id.*** at 7.

We hold that Appellant has raised a substantial question by presenting a plausible argument that his sentence is contrary to the fundamental norms which underlie the sentencing process. ***See Commonwealth v. Parlante***, 823 A.2d 927, 929 (Pa. Super. 2003) (finding that Parlante raised a substantial question by arguing that "the trial court imposed a sentence that is grossly disproportionate to her crimes and failed to consider her

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> 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. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation). In every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resentences an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resentences following remand, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. . . .

42 Pa.C.S. § 9721(b). We note that "[t]he sentencing guidelines do not apply to sentences imposed as a result of . . . revocation of probation, intermediate punishment or parole." 204 Pa. Code § 303.1.

background or nature of offenses and provide adequate reasons on the record for the sentence"). We therefore address Appellant's claim on the merits. In doing so,

> we are mindful of the general rule that a sentencing court should impose a sentence 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. Where the court imposes a sentence for a felony or misdemeanor, the court shall make part of the record, and disclose in open court during sentencing, a statement of the reasons for the sentence imposed. At the same time, the court is not required to parrot the words of the sentencing code, stating every factor relevant under 42 Pa.C.S.A. § 9721(b). Instead, the record as a whole must reflect due consideration by the court of the offense and the character of the offender.

Kalichak, 943 A.2d at 290 (citations omitted).

Prior to sentencing, the trial court reviewed Appellant's lengthy history of committing retail thefts and repeatedly violating the conditions of his sentences. N.T., 1/27/2012, at 11-15. The trial court listened to both the prosecutor and to Appellant's counsel as they discussed Appellant's situation and provided sentencing recommendations. ***Id.*** at 16-23. The trial judge even asked Appellant personally why a state prison sentence was not appropriate. ***Id.*** at 24. Appellant stated that he did not see his problem "as that extreme" to warrant a state prison sentence. ***Id.*** The trial judge disagreed, noting that Appellant was "still doing the same stuff [he was] doing in 2004. [He is] only eight years older." ***Id.*** at 25. The trial judge then provided the following explanation for Appellant's sentence:

> For the record, [Appellant] has repeatedly violated my sentence. He repeatedly comes back with direct violations. And this shows [the trial c]ourt that he will not take his problems seriously, although [the trial c]ourt has bent over backward basically since 2004 and given him every opportunity to repeat programs. Every time he violates he gets another drug program. He's not taken it seriously.
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> This sentence is absolutely necessary to help [Appellant] hopefully to get serious about his drug problem with the program in state custody.

Id. at 27.

We stress that "[a]n abuse of discretion may not be found merely because an appellate court might have reached a different conclusion" than that reached by the trial court. ***Commonwealth v. Perry***, 32 A.3d 232, 236 (Pa. 2011). Thus, although we do not endorse such a lengthy sentence for crimes of the type committed by Appellant, especially where the D.A. requested less than half as long, we are constrained to find that that the trial court did not abuse its discretion in sentencing him to the statutory maximum. To the contrary, the trial judge reasonably determined that Appellant was a repeat offender whose rehabilitative needs had not been, and apparently could not be, met outside of the prison setting. N.T., 1/27/2012, at 27. While the trial judge did not explicitly discuss the protection of the public, or the gravity of Appellant's offense, we are satisfied that the trial judge considered the appropriate sentencing criteria, and that Appellant's sentence is not manifestly excessive.

Appellant directs our attention to ***Parlante***, ***supra***, and ***Commonwealth v. Ferguson***, 893 A.2d 735 (Pa. Super. 2006), in support of his argument. Appellant's Brief at 9-11. In ***Ferguson***, this Court found that a trial court abused its discretion by sentencing the appellant to, among other things, 36 years of probation after his probation and intermediate punishment sentences were revoked. 893 A.2d at 736. This Court noted that Ferguson's sentences were revoked due to nonviolent drug offenses, that the impact of his conduct on the community was relatively insignificant, and that "[w]hile the sentencing court was clearly concerned with [Ferguson's] recidivism, the court did not address how a 36 year period of probation would contribute to [Ferguson's] rehabilitative needs." ***Id.*** at 740. In ***Parlante***, this Court found that the trial court abused its discretion by imposing a four-to-eight-year sentence for technical violations of probation because it "based Parlante's sentence solely on the fact that her prior record indicated that it was likely that she would violate her probation in the future but failed to consider other important factors." 823 A.2d at 930. This Court observed that "the trial court failed to consider Parlante's age, family history, rehabilitative needs, the pre-sentence report or the fact that all of her offenses were non-violent in nature and that her last two probation violations were purely technical." ***Id.***

Unlike ***Ferguson*** and ***Parlante***, the trial court in this case clearly considered Appellant's rehabilitative needs, and reasonably explained that

these needs would be best met by a relatively lengthy sentence of total confinement. N.T., 1/27/2012, at 27. The same trial judge was responsible for imposing all of Appellant's previous sentences since 2004, and could therefore assess firsthand Appellant's progress, or lack thereof, toward rehabilitation. ***Id.*** at 11-15, 25-26. Appellant has a history of absconding from supervision and work release and, despite the numerous programs offered to him in the past, has continued to violate his probation by engaging in the same type of criminal conduct for which he was sentenced originally. ***Id.*** at 12-13, 15, 25. We therefore find that both ***Ferguson*** and ***Parlante*** are distinguishable.

Additionally, we note that the trial court did not err by imposing a sentence of total confinement. "[O]nce probation has been revoked, a sentence of total confinement may be imposed if any of the following three conditions exist: (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 court." ***Commonwealth v. Kelly***, 33 A.3d 638, 645 (Pa. Super. 2011) (citing 42 Pa.C.S. § 9771(c)).

In the instant case, Appellant admits that he "had been convicted of retail theft, thus fulfilling the necessary prerequisites for imposing a sentence of total confinement as set forth in 42 Pa.C.S.A. §[]9771(c)(1)." Appellant's Brief at 7. However, Appellant contends that the trial court erred

because "this reason alone is not sufficient to impose a sentence of total confinement" pursuant to ***Commonwealth v. Mathews***, 486 A.2d 495 (Pa. Super. 1984), and ***Commonwealth v. DeLuca***, 418 A.2d 669 (Pa. Super. 1980). ***Id.*** at 7, 9. In ***Matthews***, this Court held that

> [o]nce [42 Pa.C.S. § 9771 has been satisfied], the [trial] court should consider the Sentencing Code's criteria for total confinement, the character of the defendant, and the circumstances of the crime for which sentence is being imposed. ***Commonwealth v. DeLuca, supra***. The Sentencing Code provides that
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> > The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because:
> >
> > (1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;
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> > (2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
> >
> > (3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

486 A.2d at 497-98 (quoting 42 Pa.C.S. § 9725).

As discussed above, the record reveals that the trial court primarily based its sentence on Appellant's recidivism, his apparent failure to take his problem seriously, and his need for rehabilitation. N.T., 1/27/2012, at 27. These are all relevant considerations under 42 Pa.C.S. § 9725. The trial court found that, based on these considerations, total confinement was

"absolutely necessary." ***Id.*** Accordingly, we are again satisfied that the trial court did not abuse its discretion by imposing the statutory maximum.

Judgment of sentence affirmed.

Judge Lazarus concurs in the result.

Judge Ott concurs in the result.