

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

GREGORY CARMEN CUPIC,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 763 WDA 2013

Appeal from the Judgment of Sentence entered April 5, 2013  
In the Court of Common Pleas of Mercer County  
Criminal Division at No(s): cp-43-cr-0001498-2000.

BEFORE: FORD ELLIOTT, P.J.E., WECHT, and STRASSBURGER,\* JJ.

MEMORANDUM BY STRASSBURGER FILED: November 27, 2013

Gregory Carmen Cupic (Appellant) appeals from the judgment of sentence entered following the revocation of his probation. We affirm the judgment of sentence.

On January 9, 2001, Appellant pleaded guilty to criminal trespass, a felony of the third degree. On March 1, 2001, he was sentenced to a term of 18 months' probation. No direct appeal was taken.

On February 14, 2002, Appellant's probation was revoked and he was resentenced to a term of imprisonment of not less than 54 days nor more than one year, to be followed by two years of probation. On April 23, 2003, Appellant's probation was revoked once more. As a result, the terms of his

\*Retired Senior Judge assigned to the Superior Court.

probation were modified to require that he undergo a drug and alcohol evaluation.

Appellant subsequently absconded to the state of Florida. As a result, a bench warrant was issued on April 6, 2004. Sometime thereafter, Appellant was arrested in Florida and charged with sexually assaulting a child under the age of 13. Appellant was convicted of that offense and sentenced to a term of 10 years' incarceration.

Appellant waived extradition and returned to Pennsylvania after the completion of his Florida sentence in February of 2013. On March 7, 2013, Appellant's Pennsylvania probation was revoked as a result of his decision to abscond from the Commonwealth and his Florida conviction. On April 5, 2013, Appellant was sentenced to a term of imprisonment of not less than two nor more than five years.

Appellant filed a "Motion to Modify Sentence *Nunc Pro Tunc*" on April 22, 2013, in which he sought modification of his sentence on the basis that it is "manifestly excessive in length, because it is not specifically tailored to the nature of the offense, the ends of justice and society and the rehabilitative needs of" Appellant. The motion was denied by the violation court the same day. This appeal timely followed.<sup>1</sup> Both Appellant and the violation court complied with Pa.R.A.P. 1925(b).

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<sup>1</sup> Appellant filed his notice of appeal on May 3, 2013, within 30 days of the imposition of his sentence.

On appeal Appellant asks us to consider whether his sentence was manifestly excessive and contrary to the fundamental norms underlying the sentencing process where the sentence “was not tailored to the nature of the offense,” “the ends of justice and society and the rehabilitative needs of” Appellant. Appellant’s Brief at 4.

The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which we will not disturb absent an abuse of that discretion. ***Commonwealth v. Sierra***, 752 A.2d 910, 913 (Pa. Super. 2000). We note that Appellant’s claim presents a challenge to the discretionary aspects of his sentence.<sup>2</sup> ***See Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004) (stating that a claim that the trial court erred in imposing a sentence of total confinement upon revocation of probation is a challenge to the discretionary aspects of the sentence); ***Commonwealth v. Whitman***, 880 A.2d 1250, 1251 (Pa. Super. 2005) (stating that a claim that the sentence is excessive is a challenge to the discretionary aspects of the sentence).

Before we may reach the merits of a challenge to the discretionary aspects of sentencing, we must be satisfied that: (1) the appeal is timely;

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<sup>2</sup> It is within this Court’s scope of review to consider challenges to the discretionary aspects of an appellant’s sentence in an appeal following a revocation of probation. ***Commonwealth v. Ferguson***, 893 A.2d 735, 737 (Pa. Super. 2006).

(2) the appellant has preserved his issues; and (3) the appellant has included in his brief a Pa.R.A.P. 2119(f) concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence. Furthermore, the concise statement must raise a substantial question that the sentence is inappropriate under the sentencing code. **See Commonwealth v. Corley**, 31 A.3d 293, 295-96 (Pa. Super. 2011).

Instantly, Appellant's notice of appeal was filed timely. However, Appellant failed to raise his sentencing claims either during the sentencing proceeding or in a timely post-sentence motion.<sup>3</sup> Thus, his issue is waived.

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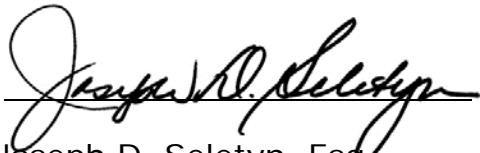
<sup>3</sup> "Pennsylvania Rule of Criminal Procedure 720(A)(2)(a) provides that, [e]xcept as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence." However, under 42 Pa.C.S. § 5505, a trial court has the authority to modify or rescind any order within 30 days after its entry as long as no appeal has been taken. **Id.** Therefore, if a defendant wants the court to reconsider the sentence at any time before the 30 days have elapsed, he or she must seek permission to file a post-sentence motion *nunc pro tunc*. **Commonwealth v. Dreves**, 839 A.2d 1122, 1128 (Pa. Super. 2003) (*en banc*). This request must "demonstrate sufficient cause, *i.e.*, reasons that excuse the late filing" in order to be eligible to be heard on the merits. **Id.**

In the instant case, Appellant filed an untimely post-sentence motion 18 days after his sentencing. In order for his motion to be heard on the merits he needed to seek permission to file a post-sentence motion *nunc pro tunc* and demonstrate reasons excusing the late filing. **Dreves, supra** at 1128. However, the post-sentence motion filed herein neither explained the basis for the untimely filing **See** Motion to Modify Sentence *Nunc Pro Tunc* 12/30/2010. While the motion's title included the term "*nunc pro tunc*", the body of the motion did not expressly ask for leave to file *nunc pro tunc*, nor did the trial court expressly grant Appellant leave to file post-sentence motions *nunc pro tunc*. Accordingly, we find he has waived his issues on appeal.

**See** Pa.R.A.P. 302 (issues not raised in the lower court are waived and cannot be raised for the first time on appeal), **see also Commonwealth v. Foster**, 960 A.2d 160, 163 (Pa. Super. 2008), (“Claims relating to the discretionary aspects of a sentence are waived if not raised either at sentencing or in a post-sentence motion.”); **Commonwealth v. Malovich**, 903 A.2d 1247, 1251 (Pa. Super. 2006) (noting that to preserve challenge to discretionary aspects of sentence, appellant must raise the issue during sentencing or post-sentence motion).

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/27/2013