

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ABDUL Q. NEDAB,	:	
	:	
Appellant	:	No. 797 MDA 2012

Appeal from the Judgment of Sentence entered May 24, 2011, in the Court of Common Pleas of Schuylkill County, Criminal Division, at No. CP-54-CR-0000738-2004.

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

MEMORANDUM BY STRASSBURGER, J.: Filed: January 10, 2013

Appellant, Abdul Q. Nedab, appeals *nunc pro tunc* from the May 24, 2011 judgment of sentence of one to two years' imprisonment, entered following the revocation of his probation. We affirm.

The trial court summarized the relevant facts and procedural history of this case as follows:

This case was originally disposed of by a sentencing order of May 2, 2006, following [Appellant's] guilty plea to a charge of [criminal conspiracy to possess contraband. As a result[,] a split sentence of no less than 1 year less 2 days nor more than 2 years less 1 day in county prison was imposed, followed by 24 months [of] probation. That original sentence was in the mitigated sentencing range (standard range 15 to 21 months) and was run concurrent with a current sentence [Appellant] was serving in Montgomery County (CP-46-CR-9054-2000). Two other counts merged and a sentence of 9-23 months [of incarceration] was imposed on a charge of criminal use of a communication facility that ran concurrent with the criminal conspiracy count. On December 18, 2006, [Appellant] was paroled and supervision of both parole and probation was

* Retired Senior Judge assigned to the Superior Court.

initiated. On May 27, 2007, the Commonwealth filed a motion to revoke [Appellant's] parole and probation for technical violations (residence violations, travel violations, operating a motor vehicle without a license, charged and convicted of a summary offense of harassment) and following hearing on the revocation petition [Appellant's] parole and probation from the sentence of May 2, 2006, was revoked on June 21, 2007. [Appellant] was recommitted to serve the parole violation imposed in the original sentence, was not denied credit for time at liberty on parole, and the court maintained the 24 month probation sentence to follow service of the original period of incarceration.

[Appellant] was re-paroled on August 21, 2007. On March 3, 2009, a second revocation petition was filed seeking to revoke the probationary portion of the sentence of May 2, 2006, based upon a new DUI arrest which allegedly occurred on August 21, 2009, in Montgomery County. In addition[,] technical violations were alleged [which] included [Appellant's] failure to report to his supervising probation officer. A hearing on that petition was scheduled for March 17, 2009[;] however [Appellant] failed to appear for the revocation hearing. As a result a bench warrant was issued for [Appellant's] arrest based upon his whereabouts being unknown on April 1, 2009. In May 2011, [Appellant's] whereabouts were secured and on May 4, 2011, the bench warrant issued was vacated and the revocation hearing was rescheduled for May 24, 2011. At the May 24, 2011 hearing [Appellant] was represented by the public defender's office, and following hearing on the petition, which included admissions by [Appellant] of violations of his probation including two subsequent convictions, [Appellant] was sentenced to serve 1 to 2 years in state prison consecutive to a current sentence in Philadelphia County (CP-51-CR-11953-2009). The result was an aggregate sentence of 6 to 12 years of state incarceration. [Appellant neither filed a motion to modify sentence nor a direct appeal.]

* * *

On November 21, 2011, [Appellant] filed a *pro se* petition for relief pursuant to the post-conviction relief act alleging that he was ineffectively represented by counsel at [the May 24, 2011] probation revocation hearing and further alleging that despite his request, counsel at the probation revocation hearing failed to file

a post sentence motion or an appeal when directed to do so by [Appellant]. ... Because allegations were made of ineffective assistance of counsel at the revocation hearing at issue ... counsel was appointed to represent [Appellant] in the post-conviction relief act petition and appointed counsel, Attorney Markosky, was granted leave to make any amendments to the existing PCRA petition by order dated January 5, 2012. Amendments to the petition were filed by Attorney Markosky, the Commonwealth was directed to file an answer to the petition, and a hearing was scheduled by order dated February 3, 2012 limited to the effectiveness of counsel at the revocation hearing regarding [Appellant's] right to file post sentence motions and his right to appeal. **See Commonwealth v. Lantzy**, 558 Pa. 214, 736 A.2d 564 (1999). A hearing limited to the **Lantzy** issues was conducted by the court on February 21, 2012, following which the court granted the relief of [Appellant] and permitted [Appellant] to file a *nunc pro tunc* post sentence motion or a direct appeal within the time frame of the rules of criminal procedure. Thereafter [Appellant] filed a post sentence motion, an answer was filed by the Commonwealth, and a hearing on the post-sentence motion was conducted by the court on March 29, 2012. Following that hearing the court denied [Appellant's] post sentence motion[.]

Trial Court Opinion, 6/19/2012, at 3-4, 1-2. This appeal followed. Both Appellant and the trial court have complied with the directives of Pa.R.A.P. 1925.

On appeal, Appellant presents the following issues for our consideration:

1. Whether the Trial Court committed reversible error when it concluded that [Appellant] was provided with proper notice of the violations he was charged with at his probation revocation hearing, even though he was not provided notice of the violations until minutes prior to the hearing, and therefore did not have the opportunity to prepare for his hearing with his attorney, whom he only met minutes before the hearing began.

2. Whether the Trial Court committed reversible error when it concluded that [Appellant] was not denied his right to allocution as he was not informed by his counsel that he would be able to address the Court after his counsel ... had spoken on [Appellant's] behalf.

Appellant's Brief at 5.¹

It is well-settled that the revocation of a probation 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. MacGregor*, 912 A.2d 315, 317 (Pa. Super. 2006).

In his first issue, Appellant contends that the trial court erred when it determined that proper notice was afforded Appellant of the violations which formed the basis for revocation of his probation. Specifically, Appellant argues that he first learned of the violations just minutes prior to his revocation hearing, and thus did not have the opportunity to prepare for his hearing with his attorney, whom he only met minutes before the hearing began.

The trial court disposed of Appellant's argument, reasoning as follows:

At [the May 24, 2011 revocation] hearing, [Appellant] appeared before the court and indicated that he was not represented by counsel. At the time he was incarcerated in a state correctional facility [and] therefore was in [the] custody of the Commonwealth. Attorney Thompson of the Public Defender's Office was present on the date of that hearing and

¹ The Commonwealth has not filed a brief on appeal.

indicated that the public defender's office would accept representation of [Appellant] which was so directed by [the trial] court. At the revocation hearing [Appellant] was given an opportunity to continue the hearing to consult with counsel and discuss the allegations and, in fact, the court suggested that he do so. [Appellant] waived that right and proceeded to hearing on the petition, and admitted that he had been twice convicted since his probationary sentence was imposed, once in Philadelphia County [on] a firearm charge for which he received a sentence of 5 to 10 years [of] incarceration and again in Montgomery County on a driving under the influence charge, a sentence he had since completed. Although [Appellant] asserts that his due process was violated ([*Commonwealth v. Bryant*, 417 A.2d 240, 242 (Pa. Super. 1979)]), such an argument might be worthy but for the fact he waived his right to thoroughly review all allegations and more importantly had his post sentence rights reinstated and the opportunity for a hearing reinstated by th[e trial] court. The nature of [Appellant's] post-sentence motion from the revocation order of May 24, 2011 sought modification of the sentence asserting that the sentence was unduly harsh. As asserted by [Appellant] initially in his PCRA petition he felt the sentence should have been concurrent with the Philadelphia sentence and[,] as indicated in the *pro se* PCRA petition, he would not appeal a concurrent sentence. [Appellant] did testify in full at that hearing, (post sentence motion hearing of March 29, 2012 requesting reconsideration of sentence) and again admitted his convictions while on probation which were admitted to the court initially, and did little more than offer excuses as to why he should not have been convicted, particularly in Philadelphia County. At this point in time [Appellant] had approximately one year to thoroughly review the revocation petition and offer anything at the post sentence motion to offset the original findings of [the trial] court. He did not do so. Thus he was afforded full due process of the law and very simply had no means by which to refute his two convictions while on probation.

Trial Court Opinion, 6/19/2012, at 5-6.

It has been held that a defendant, whose probation has been revoked, must be granted a new revocation hearing where there is no evidence in the

record to show that the defendant had received written notice of the charges against him prior to the revocation hearing. ***Bryant, supra*** at 242. While, in this instance, the trial court acknowledged on the record that there may have been lack of formal notice or an inadequate opportunity to prepare with counsel, the court attempted to rectify the situation by offering a continuance in order that Appellant could meet with counsel, explore the probation violations asserted and prepare a defense to the charges against him. However, because Appellant expressly refused such offer, he has waived any challenge of proper notice as it relates to his opportunity, or lack thereof, to prepare a defense with counsel for his revocation hearing. ***See Commonwealth v. Collins***, 424 A.2d 1254 (Pa. 1981) (holding that failure of defendant to raise objections in violation of probation proceeding waived those objections and precluded their consideration on appeal); ***Commonwealth v. King***, 430 A.2d 990 (Pa. Super. 1981) (holding defendant's claims that he did not receive written notice of the revocation hearing and adequate time to prepare for it were waived; "objections not raised during a counseled revocation proceeding will not be considered on appeal").

Specifically, the following exchange occurred at the May 24, 2011 revocation hearing between the court, Appellant and his newly appointed counsel:

MS. THOMPSON: Your Honor, Mr. Abdul Nedab –

THE COURT: Yes.

MS. THOMPSON: -- has, while we were sitting here, asked for counsel. He had not applied for our office. It appears he would be eligible for our office. He's incarcerated. However, in talking to him, it looks like there's some things that should be looked into before going forward with any kind of hearing.

THE COURT: I know there's some things because I know he was trying to get this matter slated for hearing for some time. I - - unfortunately, you mailed things directly to me. I'm retired. I'm not here every day. And what I did when I saw your request - you were in State incarceration. I believe that's a bench warrant still outstanding. Obviously, that bench warrant can't remain in place if he's in State. The Commonwealth knows his whereabouts. And what I did is I tried to expedite it. So I threw it on the very next list when I was aware that you were in prison.

I want to get this thing cleared up, though, because I don't know where he stands right now with the State sentence. Have you been - - are you subject to parole?

MS. THOMPSON: He's been sentenced to a 5-10 year sentence.

THE COURT: Well, where is he on it?

THE DEFENDANT: Two years.

THE COURT: Two years in. Is this affecting your ability to get into programs?

THE DEFENDANT: Soon. As, you know, depending on how much time it would take, it would to get into certain programs and certain different aspects of the prison.

THE COURT: I think that's, that's one of the things you had written about, being concerned that it's going to prohibit him from entering the recovery programs and other things in the State system. So I don't know what you're asking for. We have him here.

MS. THOMPSON: That's fine.

THE COURT: I'm just saying if you need additional time or

- -

MS. THOMPSON: He would be admitting the violations. It's just a question of sentencing. So if you'd like to hear that, we can go ahead if you're - - is that what you'd like to do?

THE COURT: You want to try and get these things resolved; is that right?

THE DEFENDANT: I do. But I mean, under advisement of counsel of course, in order to prove some things I guess, it might be, it'd be better for me to try and track down who my probation officer at the time was so that, so, just so that the Court would have a better understanding of - -

THE COURT: Your probation officer where?

THE DEFENDANT: In Philadelphia. Remember, when I left, everything was transferred to Philadelphia.

THE COURT: Yeah.

THE DEFENDANT: So the guys who I was dealing with - -

MS. THOMPSON: He had indicated to me that his probation officer in Philadelphia told him that he was done - -

THE DEFENDANT: Everything was completed.

MS. THOMPSON: - - which resulted in the bench warrant.

THE DEFENDANT: That I had maxed out in September of 2008. So I was not fully aware that I still had this to deal with.

THE COURT: If he gets transferred back to the State system - - are you missing any programs out there now?

THE DEFENDANT: I'm in the electrician's class but not - -

THE COURT: Is it fatal to be away from it?

THE DEFENDANT: Kinda sorta. It's a one-year program. I'm not sure if they'll let me make up the days or if, if - -

THE COURT: My problem is if he's entitled to your office and he hasn't applied, I'm going to appoint your office to represent him. If he feels that there's evidentiary issues that he has to look into, I'm going to continue the hearing because he hasn't been represented by counsel heretofore.

I think I recall, in something that he had sent, him saying it was his belief that that thing had been completely served.

THE DEFENDANT: Right.

THE COURT: And I don't know how to address that. The problem is if I continue it to another date, it's going to be a date that I'm going to be here. And I don't know when that's going to be in the month of June because it will not be this month anymore. I don't think I'm back here at all this month.

MS. THOMPSON: Let's go forward. That's fine.

THE COURT: What?

MS. THOMPSON: I said we can go forward.

THE COURT: Well, he may not want to go forward.

THE DEFENDANT: I'm fine with it.

THE COURT: One of two things. You either got to - - why don't you - -

THE DEFENDANT: I'm fine with it, Your Honor. I'm fine with it.

THE COURT: What?

THE DEFENDANT: I'm fine with it. It's okay.

N.T., 5/24/2011, at 2-6. Thus, the record supports the trial court's determination that Appellant waived the objections he now raises regarding improper notice of his probation violations and inadequate time to prepare with counsel prior to the violation hearing. Consequently, we find Appellant's argument does not entitle him to any relief.

Next Appellant alleges that he was denied his right to allocution. While he acknowledges that counsel addressed the court on his behalf, Appellant asserts that when counsel concluded, "the court proceeded to impose sentence without giving [Appellant] an opportunity to speak on his own behalf." Appellant's Brief at 10. Specifically, Appellant argues that "he was not informed by his counsel that he would be able to address the court after his counsel had spoken on [his] behalf." *Id.* at 8. Rather, he was "informed by counsel that he would not be able to address the court." *Id.* at 10. Thus, Appellant contends that he "forever lost his opportunity to persuade the court to give him a lighter sentence due to the particular facts and circumstances of his case." *Id.* Appellant's claim is refuted by the record.

After the Commonwealth addressed the court at the revocation hearing and made a recommendation as to sentence, the court inquired as to whether Appellant would like to address the court. Specifically, the court stated:

THE COURT: That's certainly a concern. It's a concern because when I revoked him the first time, I rejected the recommendation of the Commonwealth that sought to have his

street time taken away. And I maintained him on his street time. But I'll hear from [Appellant], too, if he wants to make a pitch to me or plea, whatever.

MS. THOMPSON: The request of [Appellant], as I understand it, is that any time that you would sentence him to, he's requesting that it run concurrent to the time that he's been sentenced to. He's been sentenced to a lengthy sentence for the seriousness of the underlying violation of crimes. He is involved in programs. He is involved in schooling. And he would ask that any time be made concurrent and then would, therefore, still be supervised by the State if it wasn't consumed within the original sentence here.

THE COURT: Are you completely done with Montgomery County?

THE DEFENDANT: Yes, finally. It took years.

N.T., 5/24/2011, at 11-12. Thus, the court did extend Appellant the opportunity to make a statement in his own behalf. **See** Pa.R.Crim.P. 708(C)(1) ("At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf ..."). Accordingly, the court did not commit error by failing to afford Appellant the right of allocution, as alleged by Appellant.

To the extent that Appellant claims that he was misinformed by counsel as to his right to address the court, this claim challenges the ineffectiveness of revocation counsel. Hence, this claim is not cognizable on direct appeal. There has been no evidentiary hearing on Appellant's ineffectiveness claim, and Appellant has not waived his right to file a PCRA petition following the disposition of the instant appeal. Therefore,

Appellant's claim of revocation counsel's ineffectiveness is dismissed without prejudice pursuant to ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), and its progeny. ***See also Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011) (*en banc*) (quoting ***Commonwealth v. Liston (Liston II)***, 977 A.2d 1089, 1096 (Pa. 2009) (Castille, C.J., concurring)) ("...this Court cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an 'express, knowing and voluntary waiver of PCRA review'").

Judgment of sentence affirmed.