NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DANIEL WAYNE MCCORMICK, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 836 MDA 2012

Appeal from the Judgment of Sentence December 22, 2011
In the Court of Common Pleas of Franklin County
Criminal Division at No(s): CP-28-CR-0001334-2007, CP-28-CR-0001734-2007, CP-28-CR-0002097-2008

BEFORE: BOWES, SHOGAN, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.: Filed: January 29, 2013

Daniel Wayne McCormick appeals the December 22, 2011 judgment of sentence of total confinement in a state correctional institution imposed after the trial court found him to be in violation of both his parole and probation.[1]

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* Retired Senior Judge assigned to the Superior Court.

[1] This appeal from judgment of sentence entered December 22, 2011, was filed on May 1, 2012, after denial of a post-sentence motion. Arguably, the appeal is untimely, a implicating our jurisdiction. However, the trial court acknowledged that it gave incorrect advice to counsel regarding the time in which to appeal and attributes the late filing to a breakdown in the court's operation equivalent to that in ***Commonwealth v. Parlante***, 823 A.2d 927, 929 (Pa.Super. 2003). The trial court urges us to treat this as an appeal *nunc pro tunc*, stating that had Appellant petitioned for leave to appeal *nunc pro tunc*, the petition would have been granted. We appreciate the trial court's candor, and agree that on the facts, we have jurisdiction to entertain the within appeal.

We vacate the sentence in part and remand for the limited purpose of correcting the sentence at lower court docket number 2097 of 2008. In all other respects, we affirm.

On August 22, 2007, Appellant pled guilty at docket number 1334 of 2007 to simple assault and terroristic threats. On October 3, 2007, he was sentenced on count one, simple assault, to fifty days to twenty-three months imprisonment, and on count two, terroristic threats, to a consecutive thirty-six months of probation. On January 14, 2008, at docket number 1734 of 2007, Appellant pled guilty to simple assault and the trial court sentenced him to twenty-four months probation to run concurrent to his probation at count two of number 1334 of 2007.

On August 30, 2008, Appellant was arrested and charged at docket number 2097 of 2008[2] with possession of drug paraphernalia and possession of a controlled substance with intent to manufacture or deliver. Those charges triggered violations hearings for the two earlier cases. At a ***Gagnon I*** hearing on September 12, 2008, Appellant admitted violations of his parole and probation at counts one and two of number 1334 of 2007, and his probation at number 1734 of 2007, and waived his ***Gagnon II*** hearing. Accordingly, on October 8, 2008, he was ordered to serve the balance of his

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[2] Appellant subsequently pled guilty to the possession of drug paraphernalia charge on October 15, 2010, and was sentenced that same day to twelve months probation concurrent to sentences at 1334 of 2007 and 1734 of 2007.

sentence at count one of 1334 of 2007, six to twenty-three months in the county jail followed by thirty–six months of probation at count two. At number 1734 of 2007, Appellant received three to twenty-three months in the county jail to run concurrently with the sentence imposed at number 1334 of 2007, count two. Appellant filed an appeal to this Court on November 18, 2008, which he discontinued in 2009.

Appellant was convicted of new criminal charges in Tennessee and, after a November 5, 2010 ***Gagnon II*** hearing, was found to have violated his probation and parole. The court reinstated Appellant's October 8, 2008 sentence. Appellant was subsequently paroled on January 20, 2011, permitted to live in Tennessee, and the adult probation department transferred his case to that state for supervision. When Appellant absconded in Tennessee, the court issued a bench warrant and, following his apprehension and a hearing, the court again found Appellant in violation of his probation and parole at all three case numbers. On December 22, 2011, he was sentenced at count one of number 1334 to serve the balance initially imposed calculated from August 22, 2007, and paroled to begin serving the state sentences of one to five years imprisonment imposed at numbers 2097 of 2008 and 1334 of 2007. At count two of 1334 of 2007, he was sentenced to twelve to forty-eight months in state prison effective December 22, 2011, with credit for time served. At number 1734, he was ordered to serve the balance of his initial sentence calculated from August 22, 2007, and

immediately paroled to begin serving the state sentence imposed at numbers 2097 of 2008 and at count two of 1334 of 2007. Finally, at count one of number 2097 of 2008, possession of drug paraphernalia, Appellant was sentenced to four to twelve months in state prison to run concurrently to the sentence at count one of number 1334 of 2007, and at number 1734 of 2007.

Appellant filed a motion to modify or correct his sentences. After a hearing on April 5, 2012, the court granted Appellant credit for time served for some additional periods and denied the remainder of the motion. Notably, the court amended its sentencing order of December 22, 2011 at count one of number 2097 of 2008 to reflect that Appellant be credited time for the period from October 7, 2011 to January 19, 2012, a portion of the time he was incarcerated pending resentencing.

Appellant filed the within appeal on May 1, 2012. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), Appellant timely complied, and the court issued its Rule 1925(a) opinion on June 18, 2012.

Appellant raises five issues for our consideration:

> 1. Did the trial court err by failing to give Daniel McCormick credit time for time served from August 22, 2011 to October 6, 2011, in case 2097-2008, when defendant received credit time on cases 1334-2007 and 1734-2007, which were being served concurrently to 2097-2008?

2. Did the trial court err by imposing a sentence of total confinement for technical violations of probation in 1334-2007, 1734-2007, and 2097-2008?

3. Did the trial court err by finding that Appellant had violated probation and parole by not reporting to Tennessee probation officials when such a directive was made by Franklin County Adult Probation and not ordered by the Court?

4. Did the trial court err by not finding Appellant's original sentence entered October 3, 2007, in 1334-2007, to be illegal based on the fact that the flat sentence of probation does not have a maximum and minimum?

5. Did the trial court err by not finding that all subsequent resentences in 1334-2007 were illegal based on the fact that the original sentence was illegal?

Appellant's brief at 10-11.

Appellant contends first that he should have received credit for time served from August 22, 2011 to October 6, 2011 at number 2097 of 2008, and not merely numbers 1334 of 2007 and 1734 of 2007, as he was serving time on all three cases and the sentences ran concurrently. The trial court concedes that credit for that time served should have been given at number 2097 of 2008, "[a]s that sentence is concurrent to the other sentences[.]" Trial Court Opinion, 6/19/12, at 8. The Commonwealth agrees.[3]

The three sentences were imposed simultaneously to be concurrent. Appellant received credit for that period at both numbers 1334 and 1734 of 2007. As noted, the sentence at number 2097 was imposed concurrently.

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[3] The Commonwealth advised this Court that it did not intend to file a brief as it agreed with the trial court's Pa.R.A.P. 1925(a) opinion.

Appellant was entitled to time served on that concurrent sentence, for to do otherwise would convert a concurrent sentence to a consecutive one. We remand for correction of the sentence at number 2097 of 2008 to reflect time served for the six-week period from August 22, 2011 to October 6, 2011.

Next, Appellant contends that the trial court erred in imposing a sentence of total confinement for probation violations that he characterizes as technical, such as absconding and failing to pay fines. Appellant's brief at 16. We note preliminarily 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 one's sentence. ***Commonwealth v. Schutzues***, 54 A.3d 1212 (Pa.Super. 2012); ***Commonwealth v. Ferguson***, 893 A.2d 735, 736-737 (Pa.Super. 2006). "A challenge to the discretionary aspects of sentence must be considered a petition for permission to appeal." ***Commonwealth v. Hoch***, 936 A.2d 515, 518 (Pa.Super. 2007). Four requirements must be met before we can review such a challenge on its merits. Appellant must have preserved this discretionary sentencing claim in a timely post-sentence motion, in his Pa.R.A.P. 1925(b) statement, and in a Rule 2119(f) statement in his appellate brief. Finally, the claim must present a substantial question.

Appellant filed a counseled motion for modification of sentence on January 5, 2012, and an amended motion on January 12, 2012, incorporating his *pro se* motion, which asserted this claim. Thus, Appellant

preserved the issue below. He asserted the issue again in his Pa.R.A.P. 1925(b) statement. While his appellate brief does not contain a Rule 2119(f) statement, the Commonwealth, by failing to object, has waived any objection. ***Commonwealth v. Karns***, 50 A.3d 158, 166 (Pa.Super. 2012). The only question remaining is whether Appellant's claim presents a substantial question. A substantial question exists when an appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a special provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process. ***Commonwealth v. Flowers***, 950 A.2d 330, 331 (Pa.Super. 2008).

Appellant relies upon this Court's decision in ***Commonwealth v. Mathews***, 486 A.2d 495, 497 (Pa.Super. 1984), for the proposition that under 41 Pa.C.S. § 9771(c), total confinement for a probation violation is not permitted unless the defendant has been convicted of another crime, or his conduct indicates that it is likely he will commit another crime, or if such a sentence is essential to vindicate the court's authority. Appellant maintains that he was not convicted of another crime, that his absconding and failure to pay fines did not make it more likely that he will commit another crime, and finally, that the court did not cite vindication of its authority as a justification for imposing total confinement. Such a claim has been held to raise a substantial question and we will review it. ***Ferguson***, ***supra***.

Appellant contends that the trial court violated the requirements of 42 Pa.C.S. § 9771 by imposing a sentence of total confinement following the revocation of his probation. Section 9771 states in pertinent part:

> § 9771. Modification or revocation of order of probation
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> (a) General rule.--The court may at any time terminate continued supervision or lessen or increase the conditions upon which an order of probation has been imposed.
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> (b) Revocation.--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.
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> (c) Limitation on sentence of total confinement.--The court shall not impose a sentence of total confinement upon revocation unless it finds that:
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> (1) the defendant has been convicted of another crime; or
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> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
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> (3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S. § 9771(a), (b), (c).

Appellant claims that total confinement was not authorized because his violations were merely technical; he was not convicted of another crime. He argues further that absconding or failing to pay fines does not indicate that he is likely to commit another crime unless imprisoned. Appellant's brief at

16. He points to the following language in the court's April 5, 2012 order denying reconsideration of sentence as proof that he did not fall into any of the three categories:

> The record before the Court establishes convincingly that the Defendant has a criminal record extending to at least three states over a period of more than a half decade and, therefore, he is not merely a petty criminal. The record before the Court also established that the Defendant was arrested on new charges in the state of Tennessee while he was under supervision pursuant to sentences imposed in this Commonwealth.

Order, 4/5/12, at 2.

At the hearing on Appellant's motion for modification of sentence, the Commonwealth argued that confinement was authorized under both subsections (2) and (3) of § 9771. The Commonwealth suggested that Appellant's record proved the likelihood that he would commit another crime.

The trial court rejected Appellant's contention that he was guilty of mere technical violations of his probation and parole, citing the filing of new criminal charges in Tennessee while Appellant was under the court's supervision, as well as his absconding, failure to report and pay fines, and possession and use of controlled substances. The court concluded that, "total confinement is necessary to vindicate [its] authority." Trial Court Opinion, 6/19/12, at 9. We find no abuse of discretion on the record before us.

Next, Appellant asserts that the trial court erred in finding that he violated his probation and parole by not reporting to probation officials in Tennessee because the court did not order him to do so. Instead, the probation department directed him to report and Appellant maintains that it lacked authority to do so. He relies upon 42 Pa.C.S. § 9754(c)(10) and ***Commonwealth v. Vilsaint***, 893 A.2d 753, 757 (Pa.Super. 2006) for the proposition that only the court, not probation officers, is empowered to impose the terms of probation.

The trial court characterizes Appellant as disingenuous in challenging the probation department's authority to transfer supervision to Tennessee when he was the one who applied for the transfer. Given the court order permitting him to live in Tennessee, his home state, the court maintains that the probation department's authority to transfer supervision was authorized by the Interstate Compact, Rule 3.104-1. We agree and find this issue wholly lacking in merit.

Appellant's fourth and fifth issues rise and fall together. He alleges that his original sentence of probation entered October 3, 2007 at 1334-2007, was illegal as it did not have a maximum and a minimum, and consequently, subsequent resentences based on the original illegal sentence are also illegal. Appellant directs our attention to ***Commonwealth v. Milhomme***, 35 A.2d 1219, 1222 (Pa.Super. 2011) and ***Commonwealth v.***

Everett, 419 A.2d 793, 794 (Pa.Super. 1980) in support of the latter proposition.

We review challenges to the legality of a sentence *de novo*. ***Milhomme***, ***supra***. The trial court concluded that the flat probation sentence was legal because the minimum-maximum requirement only applies to a sentence of total confinement. ***See*** 42 Pa.C.S. § 9756(a)-(b)(1) ("(b)(1) The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed."). We agree, and since Appellant's sentence at count two of number 1334 of 2007 was legal, resentencing was legal.

Having concluded that only Appellant's argument regarding his entitlement to credit for time served was meritorious, we vacate that portion of the December 22, 2011 order regarding the resentence imposed at number 2097 of 2008, and remand for resentencing.

Judgment of sentence entered December 22, 2011 vacated as to number 2097 of 2008. In all other respects, judgment of sentence affirmed.