

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KEVIN SHAY,	:	
	:	
Appellant	:	No. 925 WDA 2012

Appeal from the Judgment of Sentence May 15, 2011  
 In the Court of Common Pleas of Allegheny County  
 Criminal Division No(s): CP-02-CR-0000290-2006  
 CP-02-CR-0000918-2007

BEFORE: STEVENS, P.J., MUNDY, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 26, 2013

Appellant, Kevin Shay, appeals from the judgment of sentence entered in the Allegheny County Court of Common Pleas. Appellant contends that the Commonwealth did not prove that he violated the conditions of his probation by a preponderance of the evidence, and that his and his wife’s testimony should have been given greater weight. We affirm.

The trial court summarized the facts of this case as follows:

[Appellant] was charged with Dissemination of Photos/Film of Child Sex Acts<sup>1</sup>, Possession of Child Pornography<sup>2</sup>, and Criminal Use of a Communication Facility<sup>3</sup>. On May 17, 2007, he appeared before this Court

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\* Former Justice specially assigned to the Superior Court.

and pled guilty to all counts of the information. At the [Appellant's] request, he was immediately sentenced to two (2) concurrent terms of imprisonment of six (6) months, with two (2) concurrent terms of probation of three (3) years. This Court also imposed special conditions on the probation, which included no contact with his wife or with children, no use of a computer and to obtain treatment at Mercy Behavioral Health. No Post-Sentence Motions were filed and no direct appeal was taken.

In August 2010, [Appellant] contacted this Court by letter and requested permission to get a computer in his home. By reply letter, this Court again denied the request. However, his probation officer suspected that the [Appellant] did have computer access, and was able to locate a Facebook page in his name. In addition, the [Appellant's] wife and step-children were found at his address, and on another visit, his probation officer heard children in the home, though she was denied entry. The probation office also learned that [Appellant] had been discharged from his treatment program at Mercy Behavioral Health for reasons involving "dishonesty."

In December 2010, [Appellant] was arrested for violating the condition of his probation. On March 15, 2011, he appeared before this Court for a *Gagnon II*<sup>1</sup> hearing, at which time this Court found him to be in violation of the conditions of his probation, revoked the probation and imposed a term of imprisonment of eight (8) to sixteen (16) months, with an additional term of probation of two (2) years.

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<sup>1</sup> 18 Pa.C.S.A. § 6312(c) – 1 count at CC 200600290, 2 counts at CC 200700918;

<sup>2</sup> 18 Pa.C.S.A. § 6312(d) – 1 count at CC 200600290, 2 counts at CC 200700918;

<sup>3</sup> 18 Pa.C.S.A. § 7512(a) – 1 count at CC 200600290, 2 counts at CC 200700918;

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<sup>1</sup> *Gagnon v. Scappelli*, 411 U.S. 778 (1973).

Trial Ct. Op., 7/10/12, at 1-2.

At the hearing, Appellant stated, "I understand all the stipulations that you have ordered . . . I have done all that you ordered." N.T. Probation Violation Hr'g, 3/15/11, at 7. The trial court, however, did not consider that statement to be true, citing Appellant's previous attempt to obtain a computer by lying that he was going to use it for school. The trial court noted Appellant also had previous violations of probation and there was an indication that he had been staying with his wife and stepchildren. *Id.* at 8-9.

"A Motion to Reconsider Sentence was filed and was denied by [the trial court] on April 11, 2011." Trial Ct. Op. at 2. In his motion to reconsider sentence, Appellant argued that at his *Gagnon II* hearing, he demonstrated that he had not accessed Facebook. Appellant's Mot. to Reconsider Sentence, 3/25/11, at 2. Appellant contended that he was unaware as to why Mercy Hospital removed him from the treatment program and that he has demonstrated remorse for his past noncompliant actions. *Id.* No direct appeal was taken. Trial Ct. Op. at 2.

On October 25, 2011, [Appellant] filed a pro se PCRA<sup>[2]</sup> Petition, alleging that he asked his attorney to file a direct appeal, but she failed to do so. New counsel was appointed and an Amended Petition followed. On May 15, 2012, [the trial court] granted the Petition and reinstated [Appellant's] appellate rights *nunc pro tunc*. This [timely] appeal followed.

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<sup>2</sup> Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

Trial Ct. Op. at 1-2. The trial court ordered a Pa.R.A.P. 1925(b) statement, which Appellant timely filed.

Appellant raises the following issue for our review: “Did the trial court err in finding that [A]ppellant violated his probation?” Appellant’s Brief at 3. Appellant argues that since 2008, his wife, Katie Shay, was the person accessing his Facebook account from her Monessen, Pennsylvania residence. *Id.* at 13. Appellant cites his wife’s testimony at the probation violation hearing that it was she who accessed the Facebook account, and she has had no contact with Appellant since the no-contact order was filed. *Id.* Appellant contends the court should have given more weight to her testimony in determining whether he violated his probation. *Id.* Based on those arguments, Appellant suggests that the judgment of sentence should be vacated because the Commonwealth did not meet its burden of proof. *Id.* at 8-9. We affirm the holding of the trial court.

As a prefatory matter, we note the trial court analyzed this issue as a challenge to the sufficiency of the evidence.

A challenge to the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused

. . . .

*Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). Unlike a challenge to the sufficiency of the evidence,

the complaint that the verdict was against the weight of the evidence requires an assessment of the credibility of the testimony offered by the Commonwealth.

***Commonwealth v. Brown***, 648 A.2d 1177, 1191 (Pa. 1994).

In this case, Appellant did not argue that the evidence presented by the Commonwealth was insufficient to support all elements of the offense. ***See Widmer***, 744 A.2d at 751. Instead, Appellant argued that the trial court improperly assessed the credibility of his and his wife's testimony. ***See Brown***, 648 A.2d at 1191. Therefore, Appellant is challenging the weight of the evidence.<sup>3</sup> ***See id.***

"An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court." ***Commonwealth v. Smith***, 853 A.2d 1020, 1028 (Pa. Super. 2004). "Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence." ***Widmer***, 744 A.2d at 753. Discretion is only abused

when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

***Id.*** at 753.

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<sup>3</sup> Appellant preserved this issue for appeal, as he raised it in a post-sentence motion. ***See*** Pa.R.Crim.P. 607(A)(1)-(3).

In *Commonwealth v. Galloway*, 434 A.2d 1220 (Pa. 1981), the defendant argued that improper weight was given to testimony from the chief prosecution witness because it contradicted other witnesses at trial. *Id.* at 1222. The Pennsylvania Supreme Court noted, however, that, “it is the function of the factfinder to pass upon credibility of witnesses and the weight to be accorded to evidence.” *Id.* The *Galloway* Court implicitly held that the jury properly weighed the conflicting testimony in convicting the defendant. *See id.*; *see also Commonwealth v. Bennett*, 827 A.2d 469, 482 (Pa. Super. 2003) (holding that trial court properly weighed, but ultimately disregarded, defendant’s contradictory description of events).

The statute addressing revocation of probation follows:

**(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.

42 Pa.C.S. § 9771(b). The Commonwealth’s burden of proof is preponderance of the evidence. *Commonwealth v. Sims*, 770 A.2d 346, 350 (Pa. Super. 2001). To find a violation of probation, the court must find that “the probationer’s conduct violated the terms and conditions of his probation and that probation has proven an ineffective rehabilitative tool incapable of deterring probationer from future antisocial conduct.” *Commonwealth v. Ahmad*, 961 A.2d 884, 888 (Pa. Super. 2008).

Instantly, because Appellant is challenging the weight of the evidence, we defer to the trial court's determinations. **See Smith**, 853 A.2d at 1028. The trial court gave little weight to Appellant's testimony because of the contradictory evidence. Trial Ct. Op. at 4. For example, Appellant admitted that he lied to the court when he asked for a computer for school purposes, when he truly wanted it for "leisure." **Id.** at 3-4. Additionally, Mercy Hospital removed Appellant from its rehabilitation program because of "dishonesty." **Id.**

The trial court also determined that Appellant's wife was not credible based on her demeanor at the hearing. **Id.** at 4. Appellant's wife testified that she had not been in contact with her husband since the no-contact order was entered. **Id.** This contradicted the probation officer's reports, which stated that Appellant's wife and her children were observed at Appellant's home. **Id.**

Based on those facts, the trial court found that neither Appellant's nor his wife's testimony was credible. Trial Ct. Op. at 3-4. Just as in **Galloway**, where the trial court properly weighed the contradictory testimony, the instant trial court properly considered, but gave little weight to, Appellant's and his wife's testimony. **See Galloway**, 434 A.2d at 1222; **see also Bennett**, 827 A.2d at 482. The record substantiates the trial court's finding that Appellant violated the terms and conditions of his probation. **See Sims**, 770 A.2d at 350. Accordingly, we discern no abuse of discretion by

J. S75038/12

the trial court in giving little weight to Appellant's and his wife's testimony and revoking his probation. **See *Widmer***, 744 A.2d at 753; **see also *Ahmad***, 961 A.2d at 888.

Judgment of sentence affirmed.