

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 02-10,310
	:	CRIMINAL DIVISION
MARK B. FISHER,	:	
Defendant	:	APPEAL

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's August 7, 2002 judgment of sentence imposed on the Defendant after having found that he had violated the terms and conditions of his probation. More specifically, the Defendant contends that the Court's bias resulted in an excessive sentence. For the following reasons, the Court finds the Defendant's stated bases are without merit.

I. Background

Just under five years ago, on March 4, 2002, the Defendant pleaded guilty to one count of felony forgery for which the Court sentenced him to one (1) year probation; within two weeks of pleading guilty, the Defendant violated the conditions of his probation (specifically, he failed to attend scheduled appointments with his probation officer and consumed illegal narcotics), and after a preliminary probation violation hearing, the Court set bail in the amount of \$100,000.00 pending the scheduling of a final probation violation hearing. At the August 7, 2002 final probation violation hearing, the Court revoked the Defendant's probation and sentenced him to undergo incarceration at a State Correctional Facility for an indeterminate period of time, the minimum of which shall be one (1) year and the maximum of which shall be seven (7) years. After the Court summarily denied the Defendant's August 16, 2002 Motion for Reconsideration

of Sentence, no further action occurred until July of 2003 when the Defendant filed a *pro se* Petition for Relief under the Post Conviction Relief Act (hereinafter, “PCRA Petition”). The Defendant’s Petition alleged, *inter alia*, that trial counsel was ineffective for failing to file an appeal despite the Defendant’s request he do so. Unfortunately, although the Court appointed the Defendant PCRA counsel, the Court took no action on the Defendant’s Petition until the Defendant alerted the Court, via letter in 2006, as to said inactivity. Upon receipt of the Defendant’s letter, the Court scheduled an initial PCRA conference in October 2006, and promptly after the conference, reinstated the Defendant’s appeal rights *nunc pro tunc* however, the Court overlooked the need to appoint the Defendant appellate counsel. Finally, after filing issues were resolved, the Defendant’s *pro se* Notice of Appeal was docketed on October 31, 2006 and, on January 18, 2007, the Court appointed appellate counsel and re-issued¹ a Pa.R.A.P. No. 1925(b) Order. On February 2, 2007, appointed counsel filed said Statement.

II. Discussion

“The imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal,” *Commonwealth v. Sierra*, 2000 PA Super 151, 752 A.2d 910, 913 (Pa. Super. 2000) quoting, *Commonwealth v. Smith*, 447 Pa. Super. 502, 669 A.2d 1008, 1011 (Pa. Super. 1996). *Commonwealth v. Coolbaugh*, 2001 Pa.Super. 77, P7, 770 A.2d 788, 792 (Pa. Super. Ct. 2001). “Upon revocation, the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing . . .”, 42 Pa.C.S. § 9771(b), and “unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality,

¹ The Court initially issued a Pa.R.A.P. No. 1925(b) Order on January 3, 2007, however, appellate counsel had not yet been appointed; therefore, the Court, after appointing counsel, issued the subsequent January 18, 2007 Pa.R.A.P. No. 1925(b) Order.

prejudice, bias or ill-will, an abuse of discretion did not occur.” *Commonwealth v. Smith*, 543 Pa. 566, 571, 673 A.2d 893, 895 (Pa. 1996) citing, *Commonwealth v. Lane*, 492 Pa. 544, 549, 424 A.2d 1325, 1328 (1981). Pertinent to the case *sub judice*, 42 Pa.C.S. § 9771(c) goes on to direct that, once a sentence of probation is revoked, the Court “shall not impose a sentence of total confinement . . . unless it finds that . . . the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned or such a sentence is essential to vindicate the authority of the court.”

Instantly, after revoking the Defendant’s probation, the Court sentenced the Defendant to one (1) to seven (7) year period of incarceration with a request that he be placed in a facility that provided a substance abuse treatment program. During the final probation violation hearing, there was much discussion about the Defendant’s struggles with drug addiction. The Court highlighted, and the Defendant admitted, that being incarcerating pending the final hearing assisted his recovery efforts; notwithstanding this fact, the Defendant, and several friends, family members, and acquaintances, testified that he should be given a county sentence, further probation and/or reconsidered for the Lycoming County Drug Court Program². The Court was familiar, by virtue of serving as an Assistant District Attorney and Drug Court Judge, with the Defendant’s previous failed attempts at recovery while being unincarcerated and, therefore, believed that incarceration, with hopes of receiving entrance into a treatment program during incarceration, was the option which offered the best chance of preventing the Defendant from committing another crime (most specifically, consuming illegal narcotics and/or the illegal activity flowing from said consumption) and/or vindicating the Court’s authority.

² The Defendant’s application for the Drug Court Program had been previously denied.

III. Conclusion

For the foregoing reasons, the Court respectfully suggest that its judgment of sentence be affirmed and the Defendant's appeal denied.

By the Court,

Nancy L. Butts, Judge

xc: DA
James R. Protasio, Esq.
Judges
Hon. Nancy L. Butts
Laura R. Burd, Esq. (Law Clerk)
Gary L. Weber, Esq. (Lycoming Reporter)