

3IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 1935-2004
 :
 TERRY KING, :
 :
 Defendant : 1925(a) OPINION

Date: December 3, 2007

OPINION IN SUPPORT OF THE ORDER OF JUNE 13, 2007 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Terry King has appealed from this court’s order of June 13, 2007 in which he was sentenced to serve a period of incarceration in the State Correctional Institution, for a minimum of one year and the maximum of thirty months. The court sentenced King following an intermediate punishment hearing held on June 13, 2007. On appeal, King asserts that the court committed three errors at that hearing. The court denies that it committed the alleged errors and therefore King’s appeal should be denied.

History of the Case

On June 18 2004, Officer Jeffery Houseknecht of the Montgomery Borough Police Department received a complaint from Andrew and Barbara Bobotas. The Bobotas made the call upon finding that six of their checks had been made out of sequence to a Terry D. King. The discovery was made by the Bobotas when their bank contacted them concerning checks with insufficient funds. The checks were drawn on the account of AEGINA LEASING, INC., a business owned by the Bobotas. The Bobotas also found, in a hidden unused desk drawer, financial statements from their credit union advising them of insufficient funds. The statements were opened. The first check, #3260, was made out for \$405.00 to Terry D. King and was endorsed and cashed by King’s sister, Darla Harper, at King’s request on June 11, 2004. The

second check, #3305, was issued to, endorsed, and cashed by Terry D. King in the amount of \$360.000 on June 17, 2004. The third check, #3261, was issued to Terry D. King and was endorsed and cashed by both Terry and Christie King in the amount of \$595.00 on June 22, 2004. The fourth check, #3307, was issued to Terry D. King and endorsed and cashed by both Terry and Christie King in the amount of \$874.00 on June 22, 2004. The Bobotas advised Officer Houseknecht that Terry King was a part time employee of their leasing business and had access to the business premises.

King was charged with the following counts: Count 1 Forgery, 18 Pa. C.S.A. § 4101(a)(2); Count 2 Theft by Unlawful Taking or Disposition, 18 Pa. C.S.A. § 3921(a); Count 3 Receiving Stolen Property, 18 Pa.C.S.A. § 3925(a); Count 4 Forgery, 18 Pa. C.S.A. § 4101(a)(2); Count 5 Theft by Unlawful Taking or Disposition 1 8 Pa. C.S.A. § 3921(a); Count 6 Stolen Property, 18 Pa.C.S.A. § 3925(a); Count 7 Forgery, 18 Pa. C.S.A. § 4101(a)(2); Count 8 Theft by Unlawful Taking or Disposition, 18 Pa. C.S.A. § 3921(a); Count 9 Receiving Stolen Property, 18 Pa.C.S.A. § 3925(a); Count 10 Forgery, 18 Pa. C.S.A. § 4101(a)(2); Count 11 Theft by Unlawful Taking or Disposition, 18 Pa. C.S.A. § 3921(a); and Count 12 Receiving Stolen Property, 18 Pa.C.S.A. § 3925(a).

King pleaded guilty and was sentenced by the Honorable Nancy L. Butts on April 8, 2005 for one consolidated count of Forgery, encompassing Counts 1, 4, 7 and 10 of the criminal information. King's sentence consisted of a restitution payment to the Bobotas in the amount of \$796.00 and to pay all costs of prosecution, including a \$250.00 DNA Detection Fund Fee. As to the consolidated count of Forgery, a felony of the third degree, King received a sentence of one year intermediate punishment under the supervision of the Lycoming County Adult Probation Office. This sentence was to run consecutively to any other sentence that King

was presently serving through the Adult Probation Office. Special conditions of the sentence included attending any program to which he is referred by the Adult Probation Office, the performance of 100 hours of community service, attending the “Making Responsible Choices Program”, and submitting a blood sample pursuant to the requirements of Act 57. A condition of intermediate punishment was also to pay all costs, fines and restitution in compliance with the April 8, 2005 order.

When the April 8, 2005 sentence was filed, King was already serving a previous sentence imposed by Judge Butts in case # 03-11,558. The sentencing for case #03-11,558 became effective on April 6, 2004 and was a sentence of 18 months probation. The sentence for that case was to end on October 6, 2005. Therefore Judge Butts’ April 8, 2005 sentencing order imposing a 1 year probation consecutive to any other sentence King was presently serving, would have commenced on October 6, 2005 at the conclusion of the sentence from the previous case, #03-11,558. The 1 year probation from the April 8, 2005 order was therefore set to max out on October 6, 2006.

On November 30, 2005, King appeared before the Honorable Kenneth D. Brown for a preliminary intermediate punishment violation hearing. Judge Brown found that probable cause existed to believe that King committed the alleged violations of his intermediate punishment sentence conditions, specifically, moving from his residence without obtaining permission from the adult probation office, terminating employment without notifying the adult probation office, failing to pay costs and fines as directed by court order, and failing to complete the court ordered community service hours as directed by the adult probation office. Judge Brown set a bail of \$5,000.00 with the following conditions: King would submit an approved residence to the adult probation office, fully cooperate with supervision including his

community service obligation, and if bail was posted, pay arrears of \$420.00 and costs within one week of release on bail. King thereafter posted bail on December 5, 2005 and no further proceeding was scheduled.

Present Violation Proceedings

On June 13, 2007, King appeared before this court for a hearing regarding further alleged violations of the intermediate punishment sentence conditions. The written violation charges were dated June 13, 2007. It was alleged at the hearing that King committed the following violations: Condition No. 1, failing to report to the adult probation office at his scheduled appointment date of April 18, 2007; Condition No. 2, failing to obtain the approval of the adult probation office prior to changing approved place of residence from 165 Louise Ave, Montgomery; Condition No. 4, failing to maintain fulltime employment and allegations of false representations of full time employment made by King; Condition No. 5, traveling outside the state of Pennsylvania without the permission of his probation officer; Condition No. 6, failing to pay court ordered fines, costs and restitution; and Condition No. 1, failing to complete the required number of community service hours.

At the conclusion of the hearing this court entered an order, filed on June 26, 2007, finding beyond a reasonable doubt that King had violated the conditions of supervision as set forth in the written charges, specifically, Condition No. 1, Condition No. 2, Condition No. 6, and Condition No. 11. This court revoked the April 8, 2005 sentence as to Counts 1, 4, 7, and 10, each charging forgery and having been consolidated all under Count 1 as Forgery. The court re-sentenced King to a period of incarceration at a State Correctional Institute, the minimum of which was to be one year and the maximum of which was to be thirty months. The sentence was to be made effective June 6, 2007, and King was entitled to credit for time

served from November 23, 2005, to November 30, 2005, February 3, 2006, to February 5, 2006, to February 10, 2006, to February 12, 2006, and June 6, 2007, to June 13, 2007. In all other respects, the conditions and provisions of the original sentence were to be maintained and re-imposed.

On June 20, 2007, King filed a Motion to Reconsider Probation Violation alleging that the sentence imposed on June 13, 2007 was excessive when viewed in light of the underlying offense. On July 10, 2007, King filed a notice of appeal from the June 26, 2007 order. On July 11, 2007, this court filed an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing King to file a concise statement of matters complained of an appeal within fourteen days of the order. On July 25, 2007, King filed his Concise Statement of Matters Complained of on Appeal.

In his statement of matters, King raises the following three issues:

- (1) The Defendant avers the Trial Court's findings of violation of parole were against the weight of the evidence as the only evidence presented was the testimony of Lycoming County Probation Officer, Brad Shoemaker;
- (2) The Defendant avers that the evidence was insufficient to prove that he committed the violations as the only evidence presented was the testimony of Lycoming County Probation Officer, Brad Shoemaker; and
- (3) The Defendant submits that the Trial Court abused its discretion in imposing sentence because of the nature of the original crime and the nature of Defendant's violations.

King's Concise Statement of Matters Complained of on Appeal Pursuant to Rule 1925(B) Order.

King's first claim that the court relied solely on the testimony of Probation Officer Brad Shoemaker making findings against the weight of the evidence, is not supported by the record.

The transcript of the final intermediate punishment hearing before this court on June 13, 2007 shows that four other individuals besides Brad Shoemaker testified at the hearing. In addition to Brad Shoemaker, Terry D. King, King's ex-wife Christie Elgi, Adult Probation Officer of Community Service Donald Warner and King's current wife Dana King, all testified at the hearing. Notes of Testimony (6/13/07).

Terry King testified regarding violation of Condition No. 1; failing to report regularly to the Adult Probation Office on April 18, 2006. King testified that he was under the belief that his sentence ended in April 2006. He purports this to be the reason for his failure to report after his March 2006 appointment. N.T. 32. At the hearing, King stated he has had previous experience with the Lycoming County probation office procedures and as such is aware that when a supervision sentence ends, a written release is issued by the adult probation office to the defendant alerting him that his sentence has been terminated. N.T. 33. King testified that he failed to report in April despite never having received a release from the adult probation office authorizing the end of his sentence. N.T., 33. Further proof of violation of Condition No. 1 is that King testified to sending a letter to Adult Probation on May 7, 2006 regarding compliance with his community service obligations. N.T. 34-37. However, this statement is inconsistent with his earlier testimony that he believed his probation to have been terminated in April of 2006. Therefore King would not have sent a letter to Adult Probation in May 2006 explaining his compliance with his sentence beyond the maximum date of supervision. N.T. 36-37. At the hearing, King could offer no explanation for his sending a letter to his probation officer after he believed his sentence to have ended. N.T. 36-37.

Dana King testified regarding violation of Condition No. 2; failure to report place of residency change. N.T., 38-39. Dana King stated that in mid April of 2006, Terry King moved

in with her at 944 Chestnut Street, Kulpmont. The 944 Chestnut Street address was not the address previously approved by the adult probation office. The previously approved address was 165 Louise Ave, Montgomery. N.T. 38. Terry King also testified that he was living with Dana King in June of 2006 at the Chestnut Street address and at the time of the hearing still resided there. N.T. 24-25, 31.

Terry King testified regarding violation of Condition No. 6; restitution, costs and fines. He admitted at the hearing that he owed a certain amount of money in March of 2006. N.T. 25

Donald Warner, adult probation officer of community service, testified specifically regarding King's violation of Condition No. 11; community service. N.T., 18-19. Warner testified that King had been assigned 125 hours of community service and had only completed 56 which left 69 hours uncompleted at the time he failed to report to Probation Officer Shoemaker on April 18, 2006. N.T., 19. Warner testified that he visited the community service work site every other Saturday when King was scheduled to be working every Saturday. N.T. 20. Warner stated that it is his practice to physically observe all of those who check in at the work sites, and that King failed on numerous occasions to do so. N.T. 21. Warner also stated that he had met previously with King in his office to clarify that King was not allowed to miss or be late to his community service assignment. N.T. 20.

The transcript from the June 13, 2007 hearing shows that testimony was elicited from individuals other than Probation Officer Brad Shoemaker. The evidence from all those who testified at the hearing was used to form the subsequent order filed on June 26, 2007. Therefore King's first issue fails for want of factual basis.

As to the second issue, the discussion under the first issue proves that testimony from individuals other than Probation Officer Brad Shoemaker was elicited and considered by the

court at the June 13, 2007 hearing. The evidence was sufficient to support a finding that the violations were committed by King beyond a reasonable doubt. As to Condition No. 1, King testified that he believed his supervision ended in April 2006 despite never receiving a release from Adult Probation and knowing that receiving a release is recognized procedure upon reaching the end of a probation sentence. N.T., 33. Moreover, King's testimony that he sent a letter to Adult Probation in May 2006 informing the office that he was in compliance with his community service is inconsistent with his earlier testimony that he believed his sentence ended in April 2006. N.T. 34-37. Finally, the court takes notice that the 1 year probation sentence in the order filed April 8, 2005 was imposed consecutive to any other sentence King was already serving. As such, the April 8, 2005 sentence did not become effective until October 6, 2005 when the previous sentence from case #03-11,558 ended. To summarize, the probation sentence of 1 year ordered on April 8, 2005, became effective October 6, 2005 and ended October 6, 2006. King testified that he failed to report on April 18, 2006 because he believed his probationary period had ended. King's belief was in error as his probation did not end until October 6, 2006.

The testimony from both Terry King and Dana King that Terry King lived at the unauthorized 944 Chestnut Street address in mid April 2006 established a violation of Condition No. 1. N.T. 24-25, 31, 38-39.

King admitted that he owed money to satisfy his costs, fines and restitution thereby establishing a violation of Condition No. 6. N.T. 25.

The testimony of Donald Warner that King was not present at the community service work site establishes a violation of Condition No. 11. N.T. 19-21.

The above testimony from the June 13, 2007 hearing establishes beyond a reasonable doubt that King violated Conditions No.'s 1, 2, 6, and 11. This court also noted during the June 13, 2007 hearing that it was not satisfied that King had been entirely truthful regarding his understanding of the conditions and end date of October 6, 2006 for his sentence. N.T. 44.

As to the third issue, the court did not abuse its discretion in re-sentencing King to a minimum of one year and a maximum of thirty months. "Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." *Commonwealth v. Roden*, 1999 Pa. Super. 105, 730 A.2d 995, 997 (Pa. Super. 1999) (quoting *Commonwealth v. Harris*, 719 A.2d 1049, 1052 (Pa. Super. 1998)).

Judge Butts had initially sentenced King on April 8, 2005 under a negotiated plea agreement to a term of 1 year probation for the consolidated count of Forgery under Counts 1, 4, 7 and 10. This was a mitigated range sentence. The forgery count is a felony of the third degree with an offense gravity score of 3. The prior record score for the Defendant is 4. Under the sentencing guidelines the minimum standard range for this crime is 3 to 14 months incarceration.

When this court found King to have violated the conditions of his probation, he was resentenced to a term of 12 to 30 months incarceration. Taking into account the standard range of 3 to 14 months, the court did not abuse its discretion in its re-sentencing of King because the sentence imposed is within the standard sentencing guidelines.

Additionally, the court did not abuse its discretion in re-sentencing King because the court found King was not truthful during the intermediate punishment hearing on June 13, 2007. The court noted that it was not convinced King had been truthful in his testimony at the

hearing. N.T. 44. In response to King's apparent dishonesty during the hearing as well as supervision violations, the court found it appropriate to sanction King by fashioning a more severe sentence than originally imposed. N. T. 44-45.

The sentence of June 13, 2007 is not an abuse of discretion because it is within the sentencing guidelines and the court noted on the record that King should be sanctioned for his less than truthful testimony as well as the nature of his probation violations. Accordingly, King's appeal should be denied and the order of June 13, 2007 affirmed.

BY THE COURT,

William S. Kieser, Judge

cc: Robert Cronin, Esquire
District Attorney
Adult Probation Office
Gary L. Weber, Esquire (Lycoming Reporter)
Judges