IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No.: 340-2008**
	:	
ELTON RUPERT,	**:**	
Defendant	**:**	

OPINION AND ORDER

Defendant filed a Post Sentence Motion on November 19, 2008. Argument on Defendant's Motion was held on December 11, 2008. Defendant raises two issues in his motion: (1) that the evidence was insufficient to justify a verdict of guilty; and (2) that he should not have been sentenced in the aggravated range. Defendant requests either Judgment of Acquittal, relief in Arrest of Judgment, a New Trial, or a modified sentence in the standard or mitigated range.

Background

On February 8, 2008, Lycoming County Adult Probation Officer, Lewis Yingling (Yingling) contacted Trooper Angela Bieber (Bieber) of the Pennsylvania State Police (PSP) with information regarding Defendant's address registered with Megan's Law. Defendant had in 2006 been convicted of Indecent Assault and required to register with Megan's Law for a period of ten years pursuant to 42 Pa.C.S. § 9591. Yingling told Bieber he supervised the Defendant and had information that the Defendant had not been staying at the 366 Fribley Church Road address (366 address) which was the address he had registered with the PSP under Megan's Law. After investigation, Bieber filed the instant charges.

A non-jury trial was held before this Court on November 4, 2008. At the time of the Trial, the Court took judicial notice of the Honorable William S. Kieser's Order dated August 7, 2007 which told the Defendant he was not to live at 492 Fribley Church Road (492 address) with Sheree Ritter and T.H. Judge Kieser's Order was issued following a Children and Youth Hearing where everyone involved was informed that the Defendant was not to have contact with T.H.

At trial, Sheree Ritter (Ritter) testified that she lived with the Defendant for twelve years at the 492 address. She explained that although the Defendant was Court ordered not to do so, he did in fact live at that address until his incarceration in February of 2008. Ritter related the Defendant did stay with his parents some at the 366 address, but often ate meals and slept at the 492 address. Ritter also explained that the Defendant always took care of the fire to ensure the house was heated. Finally, Ritter related that she received numerous phone calls at the house from the Defendant while he was incarcerated and the phone number was 584-6080 and that phone number was the number for the 492 address.

Yingling testified that on numerous occasions he discussed with the Defendant his address registration requirements under Megan's Law. Yingling related that sometime in December of 2007, the Defendant came into his office and told Yingling that he had been at the 492 address to put wood on the fire and had answered the phone while he was there and someone wondered why he was there. Yingling testified the Defendant stated he was only there to take care of the fire and was not doing anything wrong. Finally, Yingling related that on February 6, 2008, he attended an emergency Children and Youth Hearing in which Judge Kieser made a finding that the Defendant had been living at the 492 address in violation of the August 2007 Order.

Trooper Joseph Akers (Akers) of the PSP testified that he spoke with the Defendant relative to another matter on September 5, 2008 at the Lycoming County Prison. While questioning the Defendant regarding this other matter the Defendant related he was living at his house (492 address), but was not supposed to be. Akers asked the Defendant if he was living at the 492 address contrary to the Court Order and the Defendant said "Uh-huh, we was a family." N.T. 11/4/08 p. 49.

Lisa Rupert (Rupert), the Defendant's sister also testified at trial. She related that the ground to her house connects to the Defendant's property. Rupert explained that she would go to her parents' house at the 366 address every night because she did her laundry there. She related that the Defendant would be there eating dinner after he got home from working his first job and would stay there until he left for his second job. Rupert explained that the Defendant's vehicle was always parked at the 366 address. She also testified that she went to the 492 address to take care of the Defendant's dogs and iguana for him. Rupert related that she never saw the Defendant at the 492 address when she went there. Finally, she testified that she did not live at her parents' house so she did not know for sure if the Defendant slept there.

Shawn Rupert (Shawn), the Defendant's son testified that the Defendant lived at the 366 address. Shawn also explained that during this time he lived in Montgomery with his Aunt, but when he visited the Defendant, the Defendant was always at the 366 address. Shawn related that the phone number at the 366 address is 584-3133 and that he always called the Defendant at that number even when the Defendant lived at the 492 address. He also explained that even when his father lived at the 492 address he would call the phone at the 366 address if he was looking for the Defendant. Finally, Shawn testified he helped Defendant cut wood for the fire at the 492 address.

Shane Rupert (Shane) also the Defendant's son testified he lived in Bloomsburg and Montgomery during the time the Defendant lived at the 366 address. Shane related he would visit the Defendant including staying over night on a regular basis at the 366 address. Shane explained that sometimes when he would come to visit he would stay at the 492 address to play with T.H., but the Defendant would not be there. Shane related that when he stayed at the 492 address he took care of the fire, the dogs, and the iguana. He testified that when he did not stay at the residence, his Gram and Pap took care of the dogs and the iguana.

Finally, the Defendant took the stand on his own behalf. The Defendant testified that after Judge Kieser's Order excluding him from the 492 address he moved to the 366 address. He related that he ate his meals there, showered and shaved there, kept his clothing there, and received his mail there. The Defendant testified that after he moved out he still went to the 492 address to cut wood to keep the fire going. He explained that he would also go visit Ritter at the 492 address and that on normal nights the most amount of time he spent there was three to four hours. Finally, the Defendant testified that Wednesday nights were "the only night[s] that I went to bed with Sheree" and would be there for eight or nine hours. N.T. 11/4/08 p. 99-109.

On November 4, 2008, after a non-jury trial before this Court, the Defendant was found guilty of one count of Failure to Comply with Registration of Sexual Offender Requirements under 18 Pa.C.S. § 4915(a)(1). On November 13, 2008, the Defendant received a sentence of fifteen (15) months to four (4) years in a State Correctional Institution.

Discussion

The Defendant should not have been sentenced in the aggravated range

Defendant contends that he should not have been sentenced in the aggravated range of the sentencing guidelines and should receive a modified sentence in the standard or mitigated range.

When a Defendant is challenging the discretionary aspects of his sentence, there is no absolute right to appeal the sentence imposed. 42 Pa.C.S.A. § 9781(b). The Defendant is required to show there is a substantial question that the sentence imposed is not appropriate under the sentencing code. Id. "A bald claim of excessiveness of sentence does not raise substantial question so as to permit review where the sentence is within the statutory limits." Commonwealth v. Petaccio, 764 A.2d 582, 587 (Pa. Super. Ct. 2000). See also Commonwealth v. Jones, 613 A.2d 587, 593 (Pa. Super. 1992) (en banc). "In order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process." Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa. Super. Ct. 2005). The trial court's sentence will stand unless there is a manifest abuse of discretion. To demonstrate an abuse of discretion, "the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias, or ill will, or arrived at a manifestly unreasonable decision." Commonwealth v. Perry, 883 A.2d 599, 602 (Pa. Super. Ct. 2005).

The Defendant was found guilty of one count of Failure to Register, which is a felony of the third degree. The statutory maximum for the offense is seven (7) years. The Defendant received a sentence of fifteen (15) months to four (4) years in state prison, which is within the aggravated range of the sentencing guidelines but does not exceed the maximum. The Defendant

also had a prior record score of one for the Indecent Assault offense which was the basis for the registration requirement. At the time of sentencing, the Court chose to sentence the Defendant in the aggravated range for several reasons. First, the Court found that despite the normal warnings the Defendant would have been given when convicted, he was also repeatedly informed by Yingling, his Probation Officer that he must register and chose not to do so. Second, the Court found the Defendant showed arrogance "against the system that no order was going to bind you that nobody was to tell you what to do . . ." N.T. 11/13/08 p. 8. Third, the Court also found that any sentence less than what the Defendant received would depreciate the seriousness of what he did because of the many contacts he has had with Children and Youth, Adult Probation, and the State Police by intentionally residing at the 492 address. Therefore, the Defendant's sentence within the aggravated range was appropriate and his request for a modified sentence in the standard range or mitigated range should be denied.

The evidence presented at trial was insufficient to justify a verdict of guilty

Defendant asserts the Commonwealth's evidence presented at trial was insufficient to justify a verdict of guilty and therefore requests either Judgment of Acquittal, relief in Arrest of Judgment or a New Trial.

The test used to determine the sufficiency of the evidence in a criminal matter is "whether the evidence, and all reasonable inferences taken from the evidence, viewed in the light most favorable to the Commonwealth, as verdict-winner, were sufficient to establish all the elements of the offense beyond a reasonable doubt." Commonwealth v. Maloney, 876 A.2d 1002, 1007 (Pa. Super. Ct. 2005) citing Commonwealth v. Lawson, 759 A.2d 1 (Pa. Super. Ct. 2000). When applying "the above test, the entire record must be evaluated and all evidence

actually received must be considered." Commonwealth v. Lambert, 795 A.2d 1010, 1015 (Pa. Super. Ct. 2002). An appellate court should not interfere with the trial court's findings in a non-jury trial unless "the evidence is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances." Commonwealth v. George, 878 A.2d 881, 885 (Pa. Super. Ct. 2005) (quoting Commonwealth v. Wright, 722 A.2d 157, 161 (Pa. Super. 1998)).

An individual who is subject to Megan's Law registration violates 18 Pa.C.S. § 4915(a)(1) and is guilty of Failure to Comply with Registration of Sexual Offender Requirements when that individual fails to "register with the Pennsylvania State Police as required under 42 Pa.C.S. § 9795.2 . . .." That Section requires "(2) Offenders and sexually violent predators [to] inform the Pennsylvania State Police within 48 hours of: (i) Any change of residence or establishment of an additional residence or residences." 42 Pa.C.S. § 9795.2.

In the instant case, the Commonwealth presented sufficient evidence for a verdict of guilty. Ritter testified that although he stayed at the 366 address some, the Defendant lived at the 492 address until his incarceration in February of 2008. Additionally, at the Children and Youth Hearing on February 6, 2008, Judge Kieser made a finding that the Defendant was living at the 492 address in violation of the August 2007 Order. None of the Defendant's three witnesses, Lisa Rupert, Shawn Rupert, or Shane Rupert lived at the 366 address or 492 address and were therefore, unable to report where the Defendant was at all times. Furthermore, the Court had difficulty believing the testimony of those witnesses as each presented conflicting testimony regarding who took care of the dogs and the iguana. Additionally, the Defendant's son, Shawn related that when he contacted the Defendant by telephone he called the number at the 366 address no matter where the Defendant was in fact living. Finally, the Defendant by his own

testimony stated that on normal nights he spent three to four hours at the 492 address and on Wednesday nights he "went to bed with Sheree" and would be there for eight or nine hours. N.T. 11/4/08 p. 99-1-09. Defendant also told Trooper Akers he was living at the 492 address although he was not supposed to be and that "we was a family." N.T. 11/4/08 p. 49. Viewed in the light most favorable to the Commonwealth, the Court finds there was sufficient evidence for it to find the Defendant guilty of Failure to Comply with Registration of Sexual Offender Requirements. Therefore, the Defendant's requests for either Judgment of Acquittal, relief in Arrest of Judgment, or a New Trial should be denied and judgment affirmed.

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty days (30) of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)."

ORDER

AND NOW, this ___ day of April 2009, based on the foregoing Opinion, it is hereby ORDERED AND DIRECTED that Defendant's Post Sentence Motion is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: DA (KO)
Frederick D. Lingle, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)