IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	**No. 1057-2008; 1843-2008**
v.	:	
	:	**CRIMINAL DIVISION**
ELIZABETH DAHL,	:	**APPEAL**
Defendant	:	

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

The Defendant appeals the Court's Sentencing Order dated May 18, 2011 and Order of May 23, 2011 denying the Defendant's Motion for Reconsideration of Sentence.[1] The Court notes a Notice of Appeal was timely filed on June 13, 2011 and that the Defendant's Concise Statement of Matters Complained of on Appeal was filed on July 15, 2011. The Defendant raises one issue on appeal: (1) the Trial Court erred by imposing a sentence that was unduly harsh and excessive in light of the nature of the violation, the fact that the Defendant did not have any criminal contacts since being on supervision, the Defendant's attempts at keeping in contact with the different probation offices, and the Defendant's family situation, including having custody of her 6 minor children.

Background

On May 5, 2011, a Probation Violation Hearing was held before the Honorable Nancy L. Butts on the Defendant's probation violation for dockets CR: 1843-2008 and CR: 1057-2008. Under CR: 1843-2008 the Defendant was serving a two year probation sentence for a

[1] A review of the record establishes that the Sentencing Order was actually dated May 5, 2011, and not May 18, 2011.

consolidated Theft by Deception charge and under CR: 1057-2008 the Defendant was serving a four year probation sentence on a Forgery charge. The Lycoming County Adult Probation Office transferred the Defendant's case to Alleghany County in July of 2009, but the case was returned to Lycoming County in September of 2009 when the Defendant moved to Westmoreland County. The case was then transferred to Westmoreland County, but was subsequently transferred back to Lycoming County on October 9, 2009 after Westmoreland County was unable to contact the Defendant for supervision. Matthew Gottshall (Gottshall) of the Lycoming County Adult Probation Office then tried to contact the Defendant and was able to leave a message for the Defendant on one of her telephone numbers: the Defendant failed to return Gottshall's call. On October 13, 2009, a letter was sent to the Defendant instructing her to report to the Lycoming County Adult Probation Office within 72 hours of receiving the letter, but the letter was returned to the Probation Office on October 22, 2009. A bench warrant was then issued for the Defendant's arrest, and the Defendant was detained on the warrant on April 2, 2011 in the state of Florida; the Defendant did not have permission to leave the state of Pennsylvania. At the time of the parole violation hearing, the Defendant had an outstanding costs and fines balance of $4,364.24 of which $3,185.24 is restitution. The Defendant was also $1800.00 in arrears and had never made a payment toward her costs and fines. On April 25, 2011 the Defendant was drug tested at the Lycoming County Prison and the test was positive for THC.

As a result of her actions, the Defendant violated conditions 1, 2, 5, 6, and 7 of the terms of her probation. The Defendant violated her probation in that she failed to report regularly to her probation officer, failed to obtain the consent of her probation officer before leaving her home for longer than 72 hours, left Pennsylvania without the permission of her probation officer, failed to pay her fines, court costs or restitution, and failed to abstain from using illegal drugs.

Discussion

The sentencing court erred by imposing a sentence that was unduly harsh and excessive

The Defendant claims that the sentencing court erred by imposing an unduly harsh and excessive sentence against the Defendant. 42 Pa. C. S. A. § 9781(b) provides

> The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

A Defendant has no absolute right to challenge the discretionary aspects of his sentence. Commonwealth v. Petaccio, 764 A.2d 582, 586 (Pa. Super. 2000) (See Commonwealth v. Hoag, 665 A.2d 1212 (Pa. Super. 1995). Furthermore, "[i]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings."[2] Commonwealth v. Ahmad, 961 A.2d 884, 886 (Pa. Super. 2008). "Revocation of a probation sentence is a matter committed to the sound discretion of the trial court and that court's decision will not be disturbed on appeal in the absence of an error of law or an abuse of discretion." Id. at 888. "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." See Commonwealth v. Paul, 925 A.2d 825, 829 (Pa. Super. 1997). (Quoting Commonwealth v. Kenner, 784 A.2d 808, 810 (Pa. Super. 2001)). Furthermore, "[u]pon sentencing following a revocation of probation, the trial court is limited only by the maximum sentence that it could have imposed originally at the time of the probationary sentence. Commonwealth v. Gibbons, No. 1733 MDA 2010, slip

[2] The Defendant properly preserved the right to raise this issue on appeal when she filed a Motion for Reconsideration of her probation violation sentence on May 16, 2011.

op. at 2 (Pa. Super. June 17, 2011). (See Commonwealth v. Coolbaugh, 770 A.2d 788, 792 (Pa. Super. 2011)).

The Defendant emphasizes several reasons why the sentence imposed against her was excessive: the nature of the violation; the fact that she did not have any criminal contacts since being on supervision; her attempts at keeping in contact with various probation offices; and her family situation, including her custody of six (6) minor children. The Court does not find any of the reasons for a lesser sentence listed by the Defendant to be persuasive. The nature of the Defendant's violation was that she violated not one, but five separate conditions of her supervision; how this fact should have resulted in a lesser sentence than the one imposed is unclear to the Court. Exactly what the Defendant meant by her assertion that she has not had any criminal contacts since being on supervision, the Court is uncertain. The Defendant has been in violation of her probation almost the entire time she has been on supervision, evidenced by the facts put on the record at the recent probation violation hearing. Therefore, whether the Defendant has had any **new** criminal charges filed during her supervision period is irrelevant. The Defendant's assertions that she attempted to keep in contact with various probation offices was refuted by the ample evidence produced by the Adult Probation Officer at the time of the hearing. Furthermore, the Defendant was on probation for approximately two (2) years before she was apprehended in Florida; the Court finds this gave the Defendant plenty of time to make contact with her probation officer. Finally, the Defendant asserts that the Court should have considered the Defendant's family situation, including the fact that she has six (6) minor children in her care, in the determination of her sentence. While the Court is sympathetic to the children impacted by the poor choices of the Defendant, the Court believes that the **Defendant** should have considered the fact that she has six (6) minor children relying on her before she made the decision to repeatedly violate the terms of her supervision.

It is well settled that once probation has been revoked, the court may impose a sentence of total confinement if any of the following conditions exist under Section 9771(c) of the Sentencing Code:

> (1) the defendant has been convicted of another crime;
> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
> (3) such a sentence is essential to vindicate the authority of the court.

Ahmad at 888. When it becomes apparent that the probationary order is not serving its desired rehabilitation effect, the court's decision to impose a more appropriate sentence should not be inhibited. Ahmad at 888 (See Commonwealth v. Carver, 923 A.2d 495, 498 (Pa. Super. 2007)).

In determination of the Defendant's sentence to state incarceration, the Court considered the Defendant's many repeated violations of her supervision, that she made no payments to Lycoming County for her costs and fines, and that she was positive for drugs at the county prison. The Court finds that the conduct of the Defendant clearly demonstrates her proclivity to commit further crimes if not imprisoned. The Court also finds that sentencing the Defendant to state prison was necessary to vindicate the authority of the court, as the Defendant undoubtedly dismissed the last sentence imposed against her as irrelevant, demonstrated by her complete disregard for the terms of her probation.

The Court notes that while the Defendant argues that the sentence imposed against her was excessive, she does not argue that the sentence was beyond the maximum. Furthermore, the record establishes that the sentence imposed against the Defendant was not beyond the maximum. "It is well established that the sentencing guidelines do not apply to sentences imposed as a result of probation or parole violations." Gibbons at 5. (See Commonwealth v. Ware, 737 A.2d 251, 255 (Pa. Super. 1999). The Court resentenced the Defendant on CR: 1057-2008 for Forgery, a felony of the third degree, to incarceration for 12 to 24 months where the

maximum term allowable was seven (7) years, and under CR: 1843-2008 for Theft by Deception, a misdemeanor of the first degree, to incarceration for 12 to 24 months to run concurrent to the sentence under CR: 1057-2008, where the maximum term allowable was five (5) years. The Defendant was eligible for a recidivism risk reduction incentive sentence calculated at nine (9) months. The sentence imposed by the Court on the Defendant's probation revocation was considerably less than the maximum term allowable, and was therefore neither unduly harsh nor excessive.

Conclusion

As the Defendant's argument is without merit, it is respectfully suggested that this Court's Sentencing Order of May 5, 2011 and Order of May 23, 2011 denying the Defendant's Motion for Reconsideration of Sentence be affirmed.

By the Court,

Dated: ___________________

Nancy L. Butts, President Judge

xc: DA
Robin C. Buzas, Esq.
Gary L. Weber, Esq. (LLA)