

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

COMMONWEALTH OF PENNSYLVANIA,	:	NO. 2104-2008
	:	1233-2010
vs.	:	CRIMINAL DIVISION
	:	
DAVID JALONSKI,	:	
Defendant	:	RULE 1925(a) OPINION

DATE: MAY 25, 2011

**OPINION IN SUPPORT OF THE ORDER OF MARCH 10, 2011, AS AMENDED BY
THE ORDERS OF MARCH 17, 2011 & APRIL 8, 2011, IN COMPLIANCE WITH
RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Appellant David Jalonski appeals from this Court’s order of March 10, 2011, which was entered after a final probation and intermediate punishment violation hearing. At the March 10, 2011 hearing, the Court found, and Mr. Jalonski admitted, that he did violate the conditions of his supervision by consuming alcohol and failing to report to the probation office. Pursuant to Mr. Jalonski violating the terms of his supervision this Court revoked his probation and resentenced him accordingly. Mr. Jalonski does not dispute this Court’s finding that he violated the conditions of his probation, nor that this Court revoked his probation pursuant to said violation. Mr. Jalonski asserts, by and through attorney, Kirsten Gardner, Esquire of the Public Defenders Office, in his Statement of Matters Complained of on Appeal only that “the trial court abused its discretion... by imposing an unduly harsh and excessive sentence.”

Initially, the Court notes that “when a court revokes probation and imposes a new sentence, a criminal defendant needs to preserve challenges to the discretionary aspects

of that new sentence either by objecting during the revocation sentencing or by filing a post-sentence motion. *Commonwealth v. Malovich*, 2006 PA Super 183, 903 A.2d 1247, 1251 (Pa. Super. 2006); Pa.R.Crim.P. 708(D).” *Commonwealth v. Kalichak*, 2008 PA Super 15, P10 (Pa. Super. Ct. 2008). In this case, when Mr. Jalonski’s probation was revoked and a new sentence imposed at the hearing on March 10, 2011, the record does not reflect that Mr. Jalonski, through counsel, said anything to preserve the discretionary aspects of Mr. Jalonski’s new sentence.

Ms. Gardner, who represented him at the hearing, did file a post-sentence motion on his behalf on March 18, 2011. The motion, however, neglected to cite any reason for which this Court abused its discretion and merely stated that Mr. Jalonski “wishes to request a reconsideration of the resentence” and that he “believes that his resentence is unduly harsh and excessive.” By this Court’s order of March 23, 2011, Mr. Jalonski’s post-sentence motion was denied. This appeal timely followed.

This Court questions whether counsel preserved the discretionary aspects of a sentence simply by filing of a post-sentence motion requesting reconsideration, stating a belief that the sentence is unduly harsh and excessive but without citing any reasons therefore. In any event, the Court will discuss the merits of Mr. Jalonski’s complaint that this Court abused its discretion by imposing an excessive and unduly harsh sentence.

The Court re-sentenced Mr. Jalonski to twelve to twenty-four months on each of two convictions for retail theft to be served consecutively for an aggregate sentence of twenty-four to forty-eight months. The Court also determined that Mr. Jalonski was RRRI eligible

and that he be given credit for 379 days for time already served. Mr. Jalonski's sentence was not unduly harsh nor was it excessive.

“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. Robertson*, 874 A.2d 1200, 1212 (Pa. Super. 2005) quoting *Commonwealth v. Reyes*, 853 A.2d 1052, 1055 (Pa. Super. 2004). “To prove an abuse of discretion, the defendant 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. Hyland*, 875 A.2d 1175, 1184 (Pa. Super. 2005) (citing *Commonwealth v. Rodda*, 723 A.2d 212, 214 (Pa. Super. 1999)).

It is the law of this Commonwealth that once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist in accordance with Section 9771(c) of the Sentencing Code: (1) the defendant has been convicted of another crime; or (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. 42 Pa.C.S. § 9771(c)... “[I]t is only when it becomes apparent that the probationary order is not serving this desired end [of [**889] rehabilitation] the court's discretion to impose a more appropriate sanction should not be fettered.”

Commonwealth v. Ahmad, 961 A.2d 884, 888-889 (Pa. Super. 2008) (citing *Commonwealth v. Carver*, 923 A.2d 495, 498 (Pa. Super. 2007)).

“Where the court imposes a sentence..., the court shall make part of the record, and disclose in open court during sentencing, a statement of the reasons for the sentence imposed. At the same time, the court is not required to parrot the words of the sentencing code, stating every factor relevant under 42 Pa.C.S.A. § 9721(b). Instead, the record as a whole

must reflect due consideration by the court of the offense and the character of the offender.”

Commonwealth v. Kalichak, 2008 PA Super 15, P15-P16 (Pa. Super. Ct. 2008). (citing *Malovich*, 903 A.2d at 1253 & *Commonwealth v. Cappellini*, 690 A.2d 1220, 1226 (Pa. Super. 1997)).

The record in this matter does reflect that due consideration of the new sentence was made by the Court. The record reflects that the new sentenced was imposed because Mr. Jalonski is not eligible for drug court due to bench warrants being out for his arrest in other counties, Mr. Jalonski needs help dealing with his drug problems and alcoholism, and the State Correctional Institution is the best system for him to obtain the treatment that he needs. N.T., March 10, 2011, pp. 2-9. According to Mr. Jalonski, “every single” charge, conviction, and arrest that he has had is drug and alcohol related. *Id.*, p. 6. His addiction to drugs and alcohol is so sever that he stated in court that he anticipated drinking himself to death. *Id.* He furthermore admitted that “alcohol plays a huge part” in his unlawful conduct. *Id.* Thus, Mr. Jalonski fits squarely within Section 9771(c)(2) of the Sentencing Code. Section 9771(c)(2) directs that a sentence up to the statutory maximum, total confinement, may be imposed where “the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned.” Not only does the Court have the discretion to sentence Mr. Jalonski to total confinement based upon his probation violation and revocation, this Court believes that incarceration is the only way to ensure Mr. Jalonski’s sobriety. *Id.* In addition, the record clearly reflects that only through Mr. Jalonski’s sobriety can he become a law abiding citizen, and that only through incarceration can Mr. Jalonski become sober. *Id.*

Mr. Jalonski offers no legitimate reasons for which this Court's sentence should be overturned. There must be a substantial question as to the appropriateness of the sentence. *Commonwealth v. Kimbrough*, 872 A.2d 1244, 1262 (Pa. Super. 2005); *Commonwealth v. Tirado*, 870 A.2d 362, 365 (Pa. Super. 2005). The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. *Hyland*, supra; *Commonwealth v. Twitty*, 876 A.2d 433 (Pa. Super. 2005). The Superior Court has remarked, however, that "the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court, and a challenge to the imposition of consecutive sentences simply does not raise a substantial question." *Commonwealth v. Lloyd*, 878 A.2d 867, 873 (Pa. Super. 2005) (citing *Commonwealth v. Graham*, 661 A.2d 1367, 1373 (1995)). In determining whether a sentence is excessive, an appeals court ought not to replace the trial court's judgment with its own unless the trial court's sentence of a defendant demonstrates that the court below clearly abused its discretion. *Commonwealth v. O'Brien*, 422 A.2d 894 (Pa. Super. 1980); see also *Commonwealth v. Franklin*, 446 A.2d 1313 (Pa. Super. 1982)). In this instance, there has been no abuse of discretion.

As a general rule "a sentencing court should impose a sentence consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." *Commonwealth v. Kalichak*, 2008 PA Super 15, P15-P16 (Pa. Super. Ct. 2008) citing 42 Pa.C.S.A. § 9721(b). Because this Court sees no other avenue for Mr. Jalonski to obtain the help that he needs, incarceration is the only means that this Court has to

protect the public and serve the rehabilitative needs of Mr. Jalonski. Furthermore, Mr. Jalonski's sentence does not exceed the statutory maximum for either retail theft offence, this Court believes it is in Mr. Jalonski's and the general public's best interests for the sentence as to the two theft offences to be served consecutively in order for him to obtain and maintain sobriety, and Mr. Jalonski was given credit for all legally allowable time already served. Mr. Jalonski's appeal should be denied and this Court's order of March 17, 2011 and April 8, 2011 affirmed.

BY THE COURT,

Joy Reynolds McCoy, Judge

cc: Superior Court (Original +1)
Kirsten Gardner, Esquire
Gary Weber, Esquire
DA
APO
The Honorable Joy Reynolds McCoy
Francesca Schultz, Esquire, Law Clerk to The Honorable Joy Reynolds McCoy
Judges