IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	
v.	**:**	**No. 385-2008**
	:	**CRIMINAL DIVISION**
ANDRE MULLEN,	**:**	**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 of May 24, 2011 on the Defendant's parole violation, and Order of June 9, 2011 denying the Defendant's Motion for Reconsideration of Sentence. The Court notes a Notice of Appeal was filed June 24, 2011 and that the Defendant's Concise Statement of Matters Complained of on Appeal was filed on July 26, 2011. The Defendant raises one issue on appeal: (1) the Trial Court erred by imposing a sentence that was unduly harsh and excessive.

Background

On May 12, 2011, a Probation Violation Hearing was held before this Court on the Defendant's probation violation for docket CR: 385-2008 under which the Defendant was serving for Count 3 Simple Assault, a misdemeanor of the second degree, an 18 month Intermediate Punishment sentence with the first 3 months to be served at the Pre-Release Center, and for Count 4 Resisting Arrest, also a misdemeanor of the second degree, an eighteen month Intermediate Punishment sentence with the first 6 months to be served at the Pre-Release Center. The sentences were to run consecutive to one another, for an aggregate sentence of 36 months Intermediate Punishment with the first 9 months to be served at the Pre-Release Center.

On May 1, 2010, the Defendant reported to the Adult Probation Office where he submitted to a urinalysis which tested positive for marijuana: the Defendant was issued a verbal warning. On June 10, 2010, the Defendant failed to report to probation as directed. Probation Officer Aaron Geiser attempted to contact the Defendant at his residence on June 15 and 29, 2010, but was unsuccessful. On July 12, 2010, a bench warrant was issued for the Defendant's arrest. On May 5, 2011, the Defendant turned himself in to the Williamsport Police Department. However, in addition to the warrant issued on July 12, 2010, the Defendant had also acquired numerous warrants relating to domestic relations violations. Once the Defendant was confined at the Lycoming County Prison, he submitted to a urinalysis which was again positive for marijuana. At the time of the Probation Violation Hearing, the Probation Office recommended that the Court revoke the initial Intermediate Punishment sentence and re-sentence the Defendant to 18 months Intermediate Punishment with 6 months to be served at the Pre-Release Center on each count to run consecutive to one another. However, the Court determined that a sentence of state incarceration was more appropriate and sentenced the Defendant to confinement for a period of 12 to 48 months, effective May 12, 2011.[1]

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. However, the Defendant fails to specify exactly why he feels the sentence imposed was either unduly harsh or excessive. 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

[1] The ultimate sentence imposed followed two amended orders dated June 30, 2011 and July 26, 2011.

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

The Defendant claims that the sentence imposed against him was unduly harsh and excessive without providing the Court with any basis for this allegation. The Court notes that at the time of the Probation Violation Hearing, the Court gave the Probation Office and the

[2] The Defendant properly preserved the right to raise this issue on appeal when he filed a Motion for Reconsideration of his probation violation sentence on May 31, 2011.

Defendant opportunities to demonstrate to the Court why the Defendant should be re-sentenced to county prison in accordance with Probation's recommendation; the only reasons iterated were the fact that the Defendant turned himself in to the police, that he did not intentionally injure the police during the altercation that led to his resisting arrest charge, his low prior record score, and the fact that his domestic relations violations stemmed from his inability to pay. The Court observed that the Defendant turned himself in to police only after evading the police for almost a year, a fact which the Court did not view favorably. As to the Defendant's argument that his Resisting Arrest charge did not stem from an intentional attack on a police officer, but rather occurred during the Defendant's attempts to avoid arrest, the Court found this fact to be irrelevant, as the more important factor to consider was the Defendant's overt disregard for police instruction. As to the explanations for the Defendant's conduct based on his inability to pay his domestics cases, the Court stressed to the Defendant that excuses of this sort will not be tolerated: "[y]ou're old enough, you've been in the system long enough to know that the longer you put this off the worse it's going to be." N.T., 5/12/11, p. 7.

The Court also finds that the Defendant's prior record score was irrelevant in relation to the sentence imposed as 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)).

The Court stated on the record the reasons why it did not go along with probation's recommendation: "[t]hat's seriously the problem I'm having is you're on supervision for resisting meaning that you're not – when they tell you to, you know, go quietly you're not doing that and now you're out on a warrant for almost a year. I can't see keeping you in the county system." N.T., 5/12/11/ p. 6. The Defendant's violations of his probation plainly demonstrate the likelihood that the Defendant would commit another crime if not imprisoned. Additionally, the Court finds that a state sentence was essential to vindicate the authority of the Court, as the Court stated on the record that: "[t]o give you a sentence any less just depreciates the seriousness of the facts that you were on supervision for and the fact that you had a warrant and you disregarded your obligation." N.T., 5/12/11, p. 7.

The Court notes that while the Defendant argues that the sentence imposed against him was excessive, he 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: 385-2008 for Simple Assault and Resisting arrest, both misdemeanors of the second degree, to 6 to 24 months state incarceration to run consecutive to one another, where the maximum term allowable for each offense was 24 months. The Defendant was not eligible for a recidivism risk reduction incentive sentence, but he did receive credit for time served from January 23, 2009 through October 23, 2009. As the sentence imposed by the Court on the Defendant's probation revocation was not beyond the maximum term allowable, the Court believes the sentence was 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 24, 2011 and Order of June 9, 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)