

Defendant for failing to report with his probation officer and for failing to reside at his home address. This was the second warrant issued for the Defendant to date, with the Defendant getting out of jail on the first warrant a mere three (3) months before the second was issued. The Defendant was previously residing with his mother and sister at his approved address, but they reported to probation that the Defendant was no longer residing at their address. The Defendant was detained on April 30, 2011 and tested positive for marijuana in the county prison.

As a result of his actions, the Defendant violated conditions 1, 2, and 7 of his probation. The Defendant violated his probation by failing to report to his probation officer, failing to maintain an address approved by his probation officer, and by consuming 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

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 20, 2011.

(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 calls attention to several reasons why the sentence imposed against him was excessive: the nature of the violation; the fact that his girlfriend is currently pregnant, the fact that he was dealing with the violent death of his brother, and the fact that his probation officer recommended a county sentence consisting of considerably less time than what was ordered. The Court does not find any of the reasons for a lesser sentence listed by the Defendant to be compelling. The nature of the Defendant’s violation was that he violated not one, but three separate conditions of his supervision; how this fact should have resulted in a lesser sentence than the one imposed is unclear to the Court. The fact that the Defendant’s girlfriend is pregnant should have impressed upon the Defendant the importance of taking responsibility for his actions **before** he committed several violations of his probation. As it is abundantly obvious that the Defendant has yet to learn that he must generally suffer the consequences of his poor choices, perhaps his time in state prison will make this fact clear to him. Furthermore, while the Court

does feel genuine sympathy for the Defendant's suffering in the loss of his brother, such devastations do not excuse violations of the law.

As to the Defendant's argument that the probation office recommended a county sentence of considerably less time than the sentence imposed against him, the Court notes that probation recommended a re-sentence of four (4) years intermediate punishment 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)).

The Court stated on the record the reasons why it did not go along with probation's recommendation, finding that the fact that the Defendant had two (2) warrants for his arrest while under supervision and the fact that the Defendant had multiple violations of his probation made a county sentence inappropriate. The Court stated it was "[p]retty clear that he [defendant] was doing whatever it is he wanted to do when he wanted to do it" and that a state prison sentence was therefore appropriate. N.T., 5/12/11, p. 6. The Defendant's several 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 in light of the circumstances of the Defendant's case, a county sentence would "[s]end the wrong message that it's okay to do this." N.T., 5/12/11, p. 6.

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: 598-2009 for Theft by Unlawful Taking, a misdemeanor of the first degree, to 18 months to five years incarceration in a state institution, where the maximum term allowable was five (5) years. The Defendant was eligible for a recidivism risk reduction incentive sentence calculated at thirteen (13) months and fifteen (15) days. The Court notes that the Defendant also received credit for time served for March 31, 2009 through May 6, 2009, July 21, 2010 through December 19, 2010, and April 30, 2011 through May 11, 2011. As the sentence imposed by the Court on the Defendant's probation revocation was not beyond the maximum term allowable, 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 12, 2011 and Order of May 20, 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)

