IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	
v.	**:**	**No. 1761-2009**
	:	**CRIMINAL DIVISION**
ADAM WYLAND,	**:**	**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 July 26, 2011 for the Defendant's Intermediate Punishment violation. The Court notes a Notice of Appeal was filed August 17, 2011 and that the Defendant's Concise Statement of Matters Complained of on Appeal was filed on August 30, 2011. The Defendant raises one issue on appeal: (1) the Trial Court erred by sentencing the Defendant consecutively to his new criminal charges.

Background

While serving an Intermediate Punishment sentence for a 2008 Assault conviction, the Defendant pled no contest to two counts of Indecent Assault under docket No. 1761-2009 and was sentenced on May 25, 2010 to a period of four (4) years probation with the Lycoming County Adult Probation Office. On September 14, 2010, the Defendant was detained on new criminal charges for Statutory Sexual Assault under docket No. 1521-2010, to which he entered a plea of guilty on May 24, 2011. This new criminal charge resulted in a violation of the Defendant's probation under docket No. 1761-2009, and the Defendant appeared before this Court for an Intermediate Punishment (IP) violation hearing on July 26, 2011. At the time of the IP violation hearing, the Court resentenced the Defendant on count 4, Indecent Assault, a misdemeanor of the second degree, to state incarceration for nine (9) to twenty-four (24) months,

and on count 7, Criminal Attempted Indecent Assault, also a misdemeanor of the second degree, to supervision with the Pennsylvania Board of Probation and Parole for a period of twenty-four (24) months, consecutive to the sentence imposed under count 4. On the same date, the Defendant was sentenced for his new criminal charges under docket No. 1521-2010 to count 1 Statutory Sexual Assault, a felony of the second degree, to state incarceration for nine (9) months to five (5) years, to run consecutive to the sentence imposed under docket No. 1761-2009. In his Motion for Sentence Reconsideration, the Defendant alleged that the aggregate sentence of incarceration imposed of eighteen (18) to eighty-four (84) months was excessive.

Discussion

The sentencing court erred by sentencing the Defendant consecutively to his new criminal charges

The Defendant claims that the sentencing court erred by sentencing him consecutively to his new criminal charges. 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."[1] Commonwealth v. Ahmad, 961 A.2d 884, 886

[1] 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 July 29, 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 contends that the Court erred by sentencing him consecutively to his new criminal charges, resulting in an excessive sentence. 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)).

A review of the Defendant's history establishes that he meets all three of the conditions under the Sentencing Code for the court to impose a sentence of total confinement. During the IP revocation hearing, the Court informed the Defendant that he would be sentenced on the new

criminal charges to state prison and cited several reasons for also imposing a state sentence for the IP violation. Although the Defendant requested to stay in the county prison, rather than go to state prison, so that he could complete sexual offender counseling, the Court informed the Defendant that counseling of that nature is not completed in the county prison, but rather while out on supervision, and that the Defendant had already been out on supervision and failed to complete this counseling. N.T., 7/26/11, p. 6-7. The Court pointed out that the Defendant had two new arrests while he was out on supervision, which showed the Court that the Defendant was not prioritizing what needed to be done to successfully rehabilitate himself. N.T., 7/26/11, p. 6. The Court also iterated that "[t]he fact that he's on supervision for a sex related offense and he's convicted of a new sexual related offense, for me to give a sentence that would keep him in the county prison basically would say to him, it's not a big deal, and I think it's a huge deal." N.T., 7/26/11, p. 10. The Court also explained that

> [I] have been told by men that when they have a child, especially a daughter, that their world changes. Because they've been dating women, but then when they have a daughter in their life it kind of makes them reflect upon the way they've treated women, and they think a lot more seriously about how they treat women because they have now a woman that depends on them a hundred percent….

N.T., 7/26/11, p. 10. However, the Court pointed out that the Defendant now has a daughter, but that he continues to commit sexual offenses against women; therefore, the Court stated that "[m]y ability is to deter people from doing that behavior in the future. That's what jail time does, and hopefully break the connection with being out there and being accessible to doing that kind of behavior." N.T., 7/26/11, p. 11. The Court finds that based on the circumstances of the Defendant's offenses, to have sentenced the Defendant to anything less than state prison would have been manifestly irresponsible.

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 under CR: 1761-2009 on count 4, Indecent Assault, a misdemeanor of the second degree, to state incarceration for nine (9) to twenty-four (24) months, and on count 7, Criminal Attempted Indecent Assault, also a misdemeanor of the second degree, to supervision with the Pennsylvania Board of Probation and Parole for a period of twenty-four (24) months, consecutive to the sentence imposed under count 4, where the maximum term allowable for each offense was two years incarceration. The Defendant was also sentenced on the completely new criminal charge of Statutory Sexual Assault a felony of the second degree, to state incarceration for nine (9) months to five (5) years, to run consecutive to the sentence imposed under docket No. 1761-2009, where the maximum term allowable was ten (10) years incarceration. As this new offense was a completely new sexual offense, which as the Court pointed out above was committed while the Defendant was serving probation for a previous sexual offense, the Court is not aware of any mitigating factors to justify a concurrent sentence. As the sentence imposed by the Court on the Defendant's probation revocation was not beyond the maximum term allowable, and for all of the reasons articulated above, the Court believes the sentence imposed against the Defendant was appropriate and not excessive.

Conclusion

As the Court believes the Defendant's argument is without merit, it is respectfully suggested that this Court's Sentencing Order of July 26, 2011 and Order of August 5, 2011 denying the Defendant's Motion for Reconsideration of Sentence be affirmed.

By the Court,

Dated: _____ Nancy L. Butts, President Judge

xc: DA
Jeana Longo, Esq.
Gary L. Weber, Esq. (LLA)