IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	**No. 555-2010; 1458-2010**
v.	**:**	
	:	**CRIMINAL DIVISION**
SCARLETT FULTON,	**:**	**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 Orders of November 2, 2011 and November 17, 2011 finding the Defendant in violation of probation and denying her motion for reconsideration. A Notice of Appeal was timely filed on November 22, 2011 and the Defendant's Concise Statement of Matters Complained of on Appeal was filed on December 29, 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 Defendant's attempts at receiving treatment, and the fact that she was denied Drug Treatment Court in the county because she was placed on Mental Health Court and then determined to be more appropriate for Drug Court.

Background

On October 27, 2011, a Probation Violation Hearing was held before this Court on the Defendant's probation violation for dockets CR: 555-2010 and 1458-2010. Under CR: 555-2010 the Defendant pled guilty to Retail Theft, a felony of the third degree, on September 23, 2010 and was sentenced to Intermediate Punishment Supervision with the Lycoming County Adult Probation Office for thirty-six (36) months. Special conditions of supervision imposed were that

the Defendant attend any program to which she was referred by the Adult Probation Office, including performing fifty (50) hours of community service, and if determined to be medically appropriate, she was to attend and successfully complete Mental Health Court. Under CR: 1458-2010 the Defendant pled guilty to Possession of Drug Paraphernalia, an ungraded misdemeanor, on May 10, 2011 and was sentenced to probation under the supervision of the Adult Probation Office of Lycoming County for a period of one year which was to run consecutive to the sentence imposed under CR: 555-2010. Special conditions of supervision under this sentence were that the Defendant perform twenty-five (25) hours of community service, undergo an evaluation by West Branch Drug and Alcohol Commission and comply with all recommendations with respect to that evaluation, and complete any other program to which she was referred by the Adult Probation Office.

Although the Defendant initially enrolled in Mental Health Court as directed, she was subsequently removed from the Court for a variety of reasons including the fact that many of her problems stem from drug use. The Defendant was sent for a sixty (60) day evaluation at SCI Muncy, she completed the White Deer Run/Cove Forge Health System Treatment Plan, and had her case transferred from Lycoming County to Bradford County to live with her mother. While she did not have permission to be in Lycoming County, the Defendant was detained on September 23, 2011 by the Williamsport City Police and she also tested positive for cocaine and benzodiazepine that same date.

Following the Probation Revocation hearing, the Defendant was re-sentenced under CR: 555-2010 to state incarceration for twenty-four (24) to forty-eight (48) months with a consecutive two (2) year period of probation with the Pennsylvania Board of Probation and Parole (PBPP). Under CR: 1458-2010 the Defendant was re-sentenced to a one (1) year period of probation with the PBPP to run consecutive to the sentence imposed under 555-2010.

Discussion

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

The Defendant claims that the sentence imposed against her was unduly harsh and manifestly excessive given the nature of her violations, her attempts at receiving treatment, and the fact that she was denied Drug Treatment Court in the county because she was placed on Mental Health Court and then determined to be more appropriate for Drug Court. 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 her 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 (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)).

[1] 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 November 8, 2011.

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 also Commonwealth v. Coolbaugh, 770 A.2d 788, 792 (Pa. Super. 2001)).

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). A review of the Defendant's record establishes her prior record score as a three (3), making the sentencing guideline range for the offense of Retail Theft, a felony of the third degree, a minimum of three (3) years to a maximum of seven (7) years incarceration. Therefore, the two (2) to four (4) year period of incarceration, followed by a two (2) year period of probation, was clearly less than the maximum term allowable. As to the offense of Possession of Drug Paraphernalia, an ungraded misdemeanor, the one year period of probation imposed was undoubtedly not beyond the maximum term allowable of one year incarceration.

Furthermore, 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 she will commit another crime if she 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 this case, the Defendant tested positive for cocaine and benzodiazepine and was present in Lycoming County when she knew she was not allowed to be here. The Defendant's actions not only represent a total disregard for the conditions of her probation, but her behavior is also indicative of the fact that she will more likely than not commit another crime if left on probation. Furthermore, the Defendant's history establishes that she was given several chances to receive treatment, including but not limited to a 60 day evaluation at SCI Muncy, the White Deer Run/Cove Forge Health System Treatment Plan, and supervision with both Lycoming and Bradford County. The Court finds that despite the Defendant's representation of these opportunities as "her attempts at receiving treatment," that the Defendant has squandered every prospect of help offered. The Court also notes that as the Defendant was initially placed in the Lycoming County Mental Health Court Program, that the policy of Lycoming County will be that unless there is a reason to administratively transfer someone from one program to another, once a person is placed into one treatment program, they are then excluded from further participation in another treatment program. For these reasons, the Court finds that the sentence imposed in this case was appropriate.

Conclusion

As the Defendant's argument is without merit, it is respectfully suggested that this Court's Sentencing Order of November 2, 2011 and Order of November 17, 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)