IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	**No. 1912-2007**
v.	:	
	:	**CRIMINAL DIVISION**
JONATHAN GREEN,	:	**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 dated December 8, 2011 and Order of December 22, 2011 denying the Defendant's Motion for Reconsideration of Sentence. A Notice of Appeal was timely filed on January 5, 2012 and the Defendant's Concise Statement of Matters Complained of on Appeal was filed on January 17, 2012. The Defendant raises one issue on appeal: (1) the Defendant's sentence was manifestly excessive and unduly harsh given his prior record and the nature of his violations.

Background

On December 8, 2011, a Probation Violation Hearing was held before this Court on the Defendant's probation violation for docket CR: 1912-2007 under which the Defendant was originally sentenced by the Honorable Kenneth D. Brown[1] on December 2, 2008 to state incarceration for twenty-one (21) to forty-two (42) months on count one Delivery of cocaine, and for three (3) years probation on count eight (8) Delivery of marijuana. On November 3, 2011 the Defendant violated the terms of his probation by having a positive urine for marijuana and on

[1] Judge Brown retired from active judicial service on December 31, 2009.

November 29, 2011, the night he was arrested and cited for theft of services, the Defendant violated his curfew.[2] The Defendant was thereafter resentenced on count 8 Possession with Intent to Deliver a Controlled Substance, marijuana, an ungraded felony, to state incarceration for nine (9) to twenty-four (24) months with his RRRI sentence calculated at six (6) months and twenty-two (22) days.[3]

Discussion

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

The Defendant claims that the sentence imposed against him was unduly harsh and manifestly excessive given his prior record score and the nature of his violations. 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."[4] Commonwealth v. Ahmad, 961 A.2d 884, 886 (Pa. Super. 2008). "Revocation of a probation sentence is a matter committed to the sound discretion

[2] A review of the Defendant's record establishes that on September 9, 2010, the Defendant admitted to violating the conditions of supervision, including not reporting regularly as instructed and using controlled substances. However, no further punitive action was imposed for these violations.
[3] The resentencing Order of December 8, 2011 incorrectly identifies the charge as count 1 rather than count 8.
[4] 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 December 16, 2011.

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

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). At the time the Defendant was resentenced, his prior record score having been identified by the Court in its June 12, 2008 Guilty Plea order as being a five (5), the sentencing guideline range for the offense of Possession With Intent to Deliver marijuana was six (6) to sixteen (16) months minimum confinement with the maximum term allowable being sixty (60) months.[5] Therefore, the sentence imposed was considerably less than the maximum term allowable and actually was within the sentencing guideline range although not required to

[5] When the Defendant was originally sentenced, the Judge Brown stated in the December 2, 2008 sentencing order that the probationary sentence for the marijuana count was below the sentencing guidelines according to the plea agreement in light of the fact that the Defendant was first serving a period of state incarceration.

be within that range. As the Defendant's prior record score was previously identified as a five (5), the Court finds that this would actually increase the Defendant's term of minimum confinement under the sentencing guidelines and fails to see how such a high prior record score should lessen the sentence imposed.

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 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)).

In this case, the Defendant tested positive for marijuana, violated his curfew, and received a citation for theft of services, establishing his commission of another crime while on supervision and demonstrating conduct indicative of his propensity to commit another crime if not imprisoned. Furthermore, although no punitive action was taken against him, the Defendant previously admitted to violating the terms of his probation on September 9, 2010. For these reasons, the Court finds that the imposition of a sentence of total confinement was appropriate.

Conclusion

As the Defendant's argument is without merit, it is respectfully suggested that this Court's Sentencing Order of December 8, 2011 and Order of December 22, 2011 denying the Defendant's Motion for Reconsideration of Sentence be affirmed.

By the Court,

Dated: ___________________ Nancy L. Butts, President Judge

xc: DA
Trisha D. Hoover, Esq.
Gary L. Weber, Esq. (LLA)