

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	No: 1662-2007
v.	:	
	:	CRIMINAL DIVISION
LEE PARKER,	:	APPEAL
Defendant	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

Lee Parker (Defendant) was charged with Burglary, Criminal Trespass, Theft By Unlawful Taking, and Receiving Stolen Property. The Defendant entered a guilty plea to the charge of Burglary, a felony of the first degree. On October 20, 2008, the Court sentenced the Defendant to fifteen (15) to thirty (30) months in prison with a consecutive five year probation term. On October 31, 2008, Defendant filed a Motion for Reconsideration of his Sentence. This Court denied the Motion as untimely. Defendant then filed a Notice of Appeal on November 19, 2008, and he was subsequently ordered to file a Pa.R.A.P. 1925(b) concise statement. Defendant raised only two issues: (1) the sentence imposed by the court was excessive and an abuse of discretion; and (2) the Court did not take into consideration key factors in determining the sentence. On November 13, 2009, the Superior Court of Pennsylvania affirmed the sentence stating that Defendant did not raise his claim at the sentencing proceeding or in a timely post-sentence motion.

On September 1, 2011, the Court found that Defendant violated his conditions of probation and revoked his probation. The Court re-sentenced his first degree felony charge of Burglary to a minimum of two (2) years and a maximum of five (5) years in a State Correctional Institution. On September 13, 2011, the Defendant filed a Motion for Appeal, which was

appealing the re-sentencing of his Burglary charge. On December 16, 2011, the Court re-assigned Defendant's case to Edward J. Rymsza, Esquire, in the interest of justice. The Court, in accordance with Pa.R.A.P. 1925(b), requested the Defendant to file a Concise Statement of the Matters Complained of on Appeal, on January 13, 2012. On January 19, 2012, the Court granted an unopposed Motion for extension to file a 1925(b) statement for thirty (30) days. On February 29, 2012, the Court granted another unopposed Motion for extension to file a 1925(b) statement for forty-five (45) days. On April 16, 2012, Defendant filed his Statement of Matters Complained of on Appeal.

The Defendant raises three issues on appeal: (1) the trial court abused its discretion by sentencing Appellant to a two (2) to five (5) year sentence on his probation violation where such sentence was manifestly excessive and without meaningful consideration of the relevant sentencing factors, including Appellant's mental health history and rehabilitative needs; (2) the trial court abused its discretion by permitting the state and county probation offices to engage in improper legal advocacy; and (3) the trial court improperly re-sentenced Appellant on a F1 Burglary when the underlying facts supported only a F2 Burglary.

Whether the trial court abused its discretion by sentencing Appellant to a two to five year sentence on his probation violation where such sentence was manifestly excessive and without meaningful consideration of the relevant sentencing factors, including Appellant's mental health history and rehabilitative needs

The Defendant claims that the sentence imposed against him was excessive and without meaningful consideration of relevant sentencing factors including his mental health history and rehabilitative needs. 42 Pa. C. S. A. § 9781(b) provides that:

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 also Commonwealth v. Hoag, 665 A.2d 1212 (Pa. Super. 1995). “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 Defendant received was not beyond the maximum. The Defendant pled guilty on February 27, 2008, to one count of felony one Burglary. The statutory maximum for that offense is twenty (20) years. Defendant’s sentence of two (2) to five (5) given at his final special probation violation hearing is well below the maximum sentence.

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 she is not imprisoned; or
- (3) such a sentence is essential to vindicate the authority of the court.

42 Pa.C.S. § 9771. 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. Commonwealth v. Ahmad, 961 A.2d 884 (Pa. Super. 2008) (citing Commonwealth v. Carver, 923 A.2d 495, 498 (Pa. Super. 2007)).

In this case, the Defendant did not report to his probation officer after being released from Meadows Psychiatric Center. The Defendant was specifically told to report and was even given a written instruction to report to his probation officer. Further, Defendant had not taken his medication on numerous occasions, which had resulted in him not reporting to his probation officer and neglecting psychiatric care. The Defendant's actions not only represent a total disregard for the conditions of his probation, but his behavior is also indicative of the fact that he will likely continue his noncompliance with probation by citing his mental health problems. N.T. 9/1/2011, p. 14. Also, the Defendant was intoxicated when his probation officer picked him up. The Defendant was clearly not complying with his probation conditions by intentionally placing himself in a situation that is detrimental to his mental health condition.

Finally, the Court did consider Defendant's mental health history and rehabilitative needs. The Court expressed concerns with whether Defendant could keep up with out-patient treatment. N.T., 9/1/2011, p. 12. The Court also questioned whether there were any facilities locally that could deal with Defendant's issues. Id. For these reasons, the Court finds that the sentence imposed in this case was appropriate.

Whether the trial court abused its discretion by permitting the state and county probation offices to engage in improper legal advocacy

Defendant contends in his Statement of Matters Complained of on Appeal that the trial court abused its discretion by allowing County and State probation officers to engage in improper legal advocacy. Defendant does not specifically state what comments he considers to be legal advocacy nor did he object to any statements at the court proceeding.

County probation officers are empowered by statute to exercise authority over individuals on probation or parole. *See* 42 PA.CON.S.TAT.ANN. § 9912. They are agents of the trial court, appointed to perform such duties as the court may direct. *See Commonwealth v. Kelly*, 931 A.2d 694, 698 (Pa. Super. 2007). One such duty is to detain defendants who violate probation. *See Id.* In conjunction with that authority, probation officers issue written notice of claims violations to a defendant and present evidence at *Gagnon I and II* hearings as to a defendant's alleged violation of the condition of their probation. These revocation hearings are "not required to be highly formal proceedings where traditional rules of evidence or criminal procedures must be strictly observed." *Commonwealth v. Clark*, 310 A.2d 316, 320 (Pa. Super. 1973). Thus, "it is not obligatory on the court in inquiring into the conduct of the defendant while on probation to proceed according to the forms of law observed at the trial." *Id.* Moreover, the evidence to be received by the court at a revocation hearing is not limited to that "which may come through the channel of a regular examination in court. It is the judgment of the court which is to be informed." *Id.*

Commonwealth v. Cajka, No. 212 MDA 2010, slip op. at 9-10 (Pa. Super. Sept. 23, 2010).

Further, while the courts do not look favorably upon the probation office making sentencing recommendations, this does not mean they are prohibited from doing so. *see Commonwealth v. Moore*, 583 A.2d 1 (Pa. Super. 1990). The Court's primary concern is to ensure that the trial judge is the final arbiter of the sentence. See id. at 5. The trial judge can consider the probation officer's recommendation as one of many factors in sentencing a defendant and still retain his or her sentencing responsibility. See id. at 7.

At the Sentencing and Parole Violation Hearing held on September 1, 2011, Chief of the Lycoming County Adult Probation Office, Luann Yohn (Yohn), and Pennsylvania Board of Probation and Parole Agent, Matt Kieski (Kieski), offered recommendations to the Court

regarding the appropriate sentence for the Defendant. Transcripts of Proceedings of the Sentencing and Parole Violation from September 1, 2011 reveal the following:

MATT KIESKI: Your Honor, I just want to add I mean I was willing to work with him, but not after he failed to report after being given a written instruction and after I found out that he told the Meadows not to tell me anything except when he was discharged. So I mean there is no – I mean what are you going do for somebody that says that?

.....

LUANN YOHN: Our recommendation, your Honor, would be to revoke the probation and resentence according to whatever the Court deems necessary. He's already done state time. He's on special supervision. This is not the first time that the Courts have heard this kind of testimony from Mr. Parker. This goes back to 2008 on his previous cases. It's the continual cycle.

Both Yohn and Kieski are making recommendations for Defendant's probation to be revoked. It is clear from the transcript that the Court took into account a number of other factors, in addition to Yohn and Kieski's recommendation, before sentencing the Defendant:

COURT: Okay. All right. I was looking for the original order here. Sir, I'm not feeling real comfortable that there are any facilities locally based upon your description of everything that's happened that is going to deal with your issues; but more importantly the fact that you weren't compliant with supervision, your adjustment to supervision was very poor. You were not only told, but given a written instruction to report and you didn't. The agent here says that you were intoxicated when he picked you up. That clearly can't be good for your mental health situation that you would be consuming alcohol. That's also a violation, and again, I'm still having a hard time trying to find a reason why your PO and another probation officer would fabricate this information or would lie as you described it just to put you in jail. So it just seems like you don't want to be under the supervision of the Pennsylvania Board of Probation and Parole.

The record shows that the Court considered the Defendant's entire situation and used any recommendation as only one of many factors when being sentenced. As the Court remained the final arbiter of the Defendant's sentence, there was nothing improper about Yohn or Kreski's recommendation.

Further, additional comments made by Yohn and Kieski cannot be considered legal advocacy but merely informing the Court of the circumstances of the case. As stated above,

probation officers have authority to present evidence of a defendant's alleged violation of the conditions of their probation.

COURT: Okay. All right. But I would note that it appears that you knew that you were suppose to report to the office to meet with your PO after you got out of the Meadows and you did not, right?

DEFENDANT: Yes. I was having psychotic behavior, Your Honor.

MATT KIESKI: How did he get out having psychotic behavior?

COURT: That's my thought. They wouldn't have discharged you if you were having a psychotic break and I'm not feeling comfortable with the fact that you think you can manage this out-patient . . .

. . . .

COURT: Okay. I hear what you say, but I don't necessarily believe you. Did you end up issuing a warrant for him?

MATT KIESKI: Actually me and Tracy Gross found him one day at 3:30 in the afternoon drunk at his sister's house, took him to the office, then to jail.

LUANN YOHN: There was a warrant issued, but it was previous to this before the resentencing.

The Court believes it did not commit an abuse of its discretion by permitting the Lycoming County Adult Probation Office to engage in improper legal advocacy. The Probation Officers were merely making recommendations and supplying information to the Court. As the Defendant sets forth no specific claim as to how the Lycoming County Adult Probation Office engaged in improper legal advocacy, his claim has no merit.

Whether the trial court improperly re-sentenced Appellant on a F1 Burglary when the underlying facts supported only a F2 Burglary

Defendant contends that the trial court improperly re-sentenced him on a first degree felony Burglary when the underlying facts support only a second degree felony. To activate appellate review of a sentencing issue the Defendant must make an objection before the trial

court, in post-trial motions, and on appeal. Commonwelath v. Tomasso, 457 A.2d 514, 515-16 (Pa. Super. 1982). “Thus, a sentencing issue must be raised twice below (as well as on appeal): once before the trial court at the sentencing proceeding and again in the motion to modify sentence.” Id. at 516.

Here, the Defendant pled guilty to Count 1, Burglary, a felony of the first degree on February 17, 2008. On October 20, 2008, the Court sentenced the Defendant for Burglary, a felony of the first degree, for fifteen (15) months to five (5) years in a State Correctional Institution with a consecutive five (5) year probationary sentence. Defendant did not make any objections during the sentencing. On October 20, 2008, Defendant appealed the sentencing order to the Superior Court of Pennsylvania, which the Court found was untimely. The Defendant did not raise an issue to being improperly sentenced to a felony one Burglary. Over three years later, after being re-sentenced on a probation violation, the Defendant is now raising a new issue of his original sentence. This sentence was based on the charge the Defendant in fact pled guilty to voluntarily. The Court finds that this issue has been waived.

Moreover, Defendant is not challenging that his decision to plead guilty was not knowingly, voluntarily, and intelligently made. By pleading guilty, Defendant conceded that there was sufficient evidence to support the charge. Finally, the entry of a plea of guilty “usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea.” Commonwealth v. Coles, 530 A.2d 453, 457 (Pa.Super.1987); Commonwealth v. Moyer, 444 A.2d 101 (1982); Commonwealth v. Casner, 461 A.2d 324 (1983). Therefore, the Defendant’s claim that he was improperly sentenced on the wrong charge is waived.

Conclusion

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's sentence be affirmed.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

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