

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1292-2007
vs. :
: CRIMINAL DIVISION
: DEONDRE SMITH,
Appellant : 1925(a) Opinion

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

This opinion is written in support of this Court's Order dated October 11, 2012, which re-sentenced Appellant following a probation revocation hearing. The relevant facts follow.

Appellant was charged with theft of property lost, mislaid or delivered by mistake in violation of 18 Pa.C.S. §3924. On April 24, 2008, Appellant entered a guilty plea and was sentenced to pay restitution as well as the costs of prosecution and to undergo 12 months of supervision under the Intermediate Punishment Program consecutive to any other sentences that he was serving.¹

On January 14, 2010 a bench warrant was issued for Appellant's arrest for absconding from supervision. On April 15, 2010, Appellant's sentence of 12 months of supervision under the Intermediate Punishment was revoked. Appellant was re-sentenced to 24 months of probation under the supervision of the Pennsylvania Board of Probation and

¹ On December 17, 2007, Defendant was sentenced to one year of probation for retail theft, a misdemeanor of the second degree in case no. 1948-2007, and two years of consecutive probation for retail theft, a felony of the third degree in case no. 2023-2007, as well as the payment of a \$500 fine for possession of drug paraphernalia.

Parole, consecutive to the 1 to 3 years of state incarceration he received for violating his probationary sentence for retail theft in case 2023-2007.

Appellant absconded from his parole supervision. He received a parole hit, but his parole officer gave him a break and did not seek to also violate his probation. On February 15, 2012, he was released to an approved home plan with his brother in Williamsport.

On June 26, 2012, Appellant was declared delinquent because he failed to report to his parole officer and he was not living at his approved address. On June 29, 2012, he was charged by summons with possession of a controlled substance (cocaine), possession of drug paraphernalia, harassment and defiant trespass. On July 29, 2012, Appellant's girlfriend obtained a protection from abuse order against him. Appellant turned himself in on August 9, 2012. After a preliminary parole and probation violation hearing on August 23, 2012, Appellant was remanded to the Lycoming County Prison pending disposition of his new criminal charges.²

Appellant appeared before the court on October 11, 2012 for his probation revocation hearing. The court revoked Appellant's probation for theft of lost or mislaid property and re-sentenced him to 6 to 24 months of incarceration in a state correctional institution. Appellant was made eligible for a Recidivism Risk Reduction Incentive (RRRI) with his RRI minimum being 4 ½ months. Appellant also received credit for time served from August 14, 2012 to September 30, 2012.

Appellant filed a notice of appeal on October 26, 2012.

² On October 1, 2012, Appellant pled guilty to possession of a controlled substance and the summary offenses of harassment and defiant trespass. He was sentenced to pay costs and fines and to undergo incarceration for 14

Appellant first asserts that the court lacked authority to revoke his probation because he was serving a parole sentence at the time and had not yet begun his probationary term. This claim has absolutely no merit.

Appellant's assertion was rejected over thirty years ago in Commonwealth v. Wendowski, 278 Pa. Super. 453, 420 A.2d 628, 630 (1980), wherein the Superior Court stated:

If, at any time before the defendant has completed the maximum period of probation, or *before he has begun service of his probation*, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting of the same would not be in subservience to the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation. A defendant on probation has no contract with the court. He is still a person convicted of crime, and the expressed intent of the court to have him under probation beginning at a future time does not 'change his position from the possession of a privilege to the enjoyment of a right.'

420 A.2d at 630 (citations omitted); see also Commonwealth v. Allshouse, 33 A.3d 31, 39 (Pa. Super. 2011); Commonwealth v. Hoover, 909 A.2d 321, 323 (Pa. Super. 2006); Commonwealth v. Ware, 737 A.2d 251, 253 (Pa. Super. 1999).

Appellant next contends that the court "did not have authority to revoke his probation as he was not subject to the conditions of the Adult Probation Office of Lycoming County as there was no evidence that he signed any conditions that would respect the authority of the Adult Probation Office of Lycoming County." There is no requirement in the law that a defendant sign conditions of probation before his probation can be violated. In fact, a defendant's refusal to sign his conditions of probation can form a basis for revoking

days to one year.

his probation. See Allshouse, supra at 37-38. Pennsylvania courts also have recognized that some conditions of probation are so obvious that they are implied, such as do not commit another crime. Id. While Appellant's conduct in general showed that he was unworthy of probation, his new criminal convictions provided the primary basis for the court's revocation of his probation.

Appellant also avers that the court erred in sentencing him to a period of incarceration because he "did not commit offenses of such a nature as to demonstrate that he is unworthy of probation and that the granting of the same would not be in subservience to the ends of justice and the best interest of the public, or the defendant." The court cannot agree.

Appellant's conduct and supervision history as a whole, from the date his original Intermediate Punishment sentence was imposed to the time of the revocation hearing, amply demonstrated that he was no longer worthy of probation. In January 2010, a bench warrant was issued for Appellant's arrest because he absconded from supervision. At that time, the court incarcerated Appellant for violating his probation in another case, but did not incarcerate Appellant for this case, and instead re-sentenced him to 24 months of probation. Shortly after Appellant was released on parole in the other case, he absconded from supervision again. Although he received a parole hit, his probation and parole officer gave him a break and did not even attempt to violate his probation sentence. Unfortunately, within a few months of his release, Appellant absconded from supervision and was not living at his approved address, he had a PFA order entered against him by his girlfriend, and he committed new criminal charges. This conduct shows that supervision has been an ineffective means of getting Appellant to abide the laws of this Commonwealth and the

conditions of his probation and parole and that the court was justified in incarcerating Appellant.

Finally, Appellant submits the court abused its discretion in imposing sentence because it failed to consider that: (1) a sentence of total confinement may only be imposed if the defendant has been convicted of another crime, the conduct of the defendant indicates that it is likely he will commit another crime if he is not imprisoned, or such a sentence is essential to vindicate the authority of the court; (2) Appellant' new crimes were minor offenses – an ungraded misdemeanor drug offense and a summary harassment; (3) Appellant's prior adult record only consisted of theft and possession of a small amount of marijuana; (3) Appellant was successful on juvenile probation and is still a youthful offender; and (4) Appellant has done acts that would tend to show he understands the court's authority, as he has followed the court's recommendations to begin higher education classes, and employment. In some manner or another, however, the court considered all these items.

Appellant committed new crimes; therefore a sentence of total confinement was permissible under 42 Pa.C.S.A. §9771(c). While Appellant's crimes were relatively minor, these crimes when considered in conjunction with his supervision history clearly demonstrated that Appellant was not amenable to probationary supervision.

Although Appellant may have completed his juvenile probation, the court would not go so far as to say Appellant was "successful." If Appellant were truly successful, he would have recognized the need to respect authority and abide by the laws of this Commonwealth; he would not have had any further contact with the criminal justice system. Instead, he committed several adult criminal offenses and failed or refused to comply with his conditions of supervision, resulting in multiple parole and probation revocation

proceedings. The court, though, recognized that he was a youthful offender and his crimes were not serious; therefore, the court rejected his probation and parole officer's recommendation for an 18 month to 3 year sentence in favor of a sentence of 6 to 24 months incarceration.

The court sincerely hopes that Appellant will further his education, because an education could increase his chances of obtaining employment and supporting his child after he is released from incarceration. Taking a few online classes and doing odd jobs as a handyman, though, neither outweighs Appellant's criminal conduct and his poor supervision history nor entitles him to the imposition of yet another probationary sentence.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Robert Cronin, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)